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95-1447

CASE NO._____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

PHYLLIS JASKEY JONES, PAMALA JO SWANSINGER, SANDRA JASKEY HUJARSKI, PATRICIA HUJARSKI, TERESA HUJARSKI ROSS, JANICE JASKEY BUTVIN, FRANK BUTVIN, ROBERT BUTVIN, BRIAN BUTVIN, SUSAN BUTVIN, WALTER ANIELSKI, ARLENE VANS, YVONNE VANS BEKOSCKE, ANTHONY VANS, GREGORY VANS, CAROL SCHULTZ, MARY SHAFFER, BRITTANY CULL, STEPHANIE SCHAFFER,

Petitioners,

vs.

CHEMETRON CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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85 pgs

QUESTIONS PRESENTED FOR REVIEW

Whether tort claimants who are injured as the result of pre-petition exposure to radioactive and toxic material deposited or emitted by a corporate debtor in a place and manner likely to result in injury to human beings, even if those injuries have not manifested as of the time of the filing of the bankruptcy petition, are known creditors, entitled to notice of the pending bankruptcy petition and claims bar date, before their claims can be discharged.

Whether a corporate debtor who fails to advise the Bankruptcy Court of a known class of potential tort claimants and make provision for recognition of their claims may have those claims discharged in the Bankruptcy proceeding.

What are the standards for determining whether creditors are "ascertainable" from the debtor's own records where the creditors are potential tort claimants injured as the result of pre-petition exposure to radioactive and toxic material deposited or emitted by a corporate debtor in a place and manner likely to result in injury to human beings.

PARTIES

The parties to this proceeding are listed in the caption. Because this case arises from Chemetron's Bankruptcy proceeding, we have served all the parties to the Bankruptcy Proceeding and the Bankruptcy Trustee, although they are not specifically involved in this case.

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CASE NO._____

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Third Circuit Court of Appeals entered on December 18, 1995.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on December 18, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the interpretation of two bankruptcy code provisions:

> The definition of "claim" as set forth in 11 U.S.C. § 101(A)(5): ". . . right to payment, whether or not such right is reduced to judgment, liquidated, disputed, undisputed, legal, equitable, secured or unsecured."

> 11 U.S.C. § 521(1): "The debtor shall (1) file a list of creditors. . .."

STATEMENT OF THE CASE

Summary of Proceedings

Petitioners, Phyllis Jaskey Jones, et al., (hereafter "Claimants") were injured by exposure to radioactive and other toxic and hazardous substances emitted or deposited by Chemetron and others at the McGean Chemical Company Dump on Bert Avenue in Newburgh Heights, Ohio ("Bert Avenue Dump") and the Harvard Avenue Plant ("Harvard Plant"). The Bert Avenue Dump and Harvard Plant will be referred to collectively as "Toxic Sites." Claimants did not learn the cause of their illnesses until at least 1991. When they made that determination they filed an action in the Court of Common Pleas for Cuyahoga County, Ohio, entitled Phyllis Jaskey Jones, et al. v. McGean-Rohco, Inc., et al., Case No. 227973 ("Cleveland Action"). In the Cleveland Action, Claimants filed suit against Chemetron and others seeking monetary damages and other

relief for their injuries. The Cleveland Action was filed in July of 1992.

Chemetron had filed for reorganization in bankruptcy as a subsidiary of Allegheny International, Inc. in Pittsburgh, Pennsylvania on February 20, 1988. A claims bar date of May 31, 1988 was set and ultimately, on July 12, 1990, the Bankruptcy Court confirmed the plan of reorganization.

Chemetron moved to dismiss the Cleveland Action on the grounds that only the Bankruptcy Court had jurisdiction over the issues raised in the Cleveland Action. Although Chemetron asserted the Bankruptcy Court's jurisdiction in its motion to dismiss the Cleveland Action, it took no steps to invoke the Bankruptcy Court's jurisdiction to resolve the issues which Chemetron claimed only the Bankruptcy Court could resolve.

Therefore, Claimants filed a Motion to Allow Late Filed Claims and an adversary proceeding to declare their claims not dischargeable to determine the status of their claims asserted in the Cleveland action vis-a-vis this bankruptcy proceeding. The primary basis for Claimants' Motion to Allow Late Filed Claims in the Bankruptcy Court was that they were not provided with sufficient notice of the pending Bankruptcy proceeding and that they were unaware that their illnesses were the result of Chemetron's unlawful conduct at the time Chemetron filed for Bankruptcy. The primary basis for Claimants' adversary proceeding, in addition to the notice issue, is that their claims were post-petition claims and not discharged in the bankruptcy.

The Motion and Adversary Proceeding were submitted to the Bankruptcy Court upon the Briefs of the parties and minimal documentary evidence.

The Bankruptcy Court ruled that Claimants were "known creditors" entitled to actual notice of the claims bar date and granted their Motion to file Late Claims. The Bankruptcy Court dismissed Claimants' adversary proceeding without prejudice. (A-29)

Chemetron appealed to the District Court which reversed the Bankruptcy Court's determination that Claimants were "known creditors." The District Court ruled that Claimants

were unknown creditors and that publication notice was sufficient. The District Court also ruled on Claimants' adversary proceeding which was not before the Court, holding that Claimants' claims were "dischargeable and discharged."

Claimants appealed to the Third Circuit Court of Appeals which affirmed the District Court's holding that Claimants were "unknown creditors" and that publication notice of Chemetron's bankruptcy and claims bar date was sufficient. The Third Circuit reversed the District Court's determination regarding the issue of dischargeability in the adversary proceeding and remanded the case back to the Bankruptcy Court for a determination on Claimants' adversary proceeding. The Third Circuit also held that neither of the Courts below adequately considered whether Claimants' claims should be allowed on the basis of excusable neglect under the standards set forth in Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, ____U.S. ____, ____, 113 S. Ct. 1489, 1491-92 (1993), and remanded the matter back to the Bankruptcy Court on that issue as well.

This petition concerns the Third Circuit's final determination that Claimants were not "known creditors," and therefore, Chemetron was not required to list Claimants as creditors or inform the Bankruptcy Court of their existence; and that the publication notice was sufficient notice to Claimants.

Chemetron's Tortious Conduct

Chemetron is a former owner of the Bert Avenue Dump which was used by Chemetron during the 1960's and 1970's for the disposal of industrial wastes resulting from its manufacturing operations at the Harvard Plant. From 1965 to 1972, Chemetron engaged in the production of a catalyst at the Harvard Avenue Plant which used depleted uranium. (RA-110)[1] During those years, Chemetron obtained numerous amendments

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[1] "RA" refers to the Appellant's Appendix which is part of the Record in the Third Circuit Court of Appeals.

to its license permitting it to use increasing amounts of source material. In 1965, Chemetron was authorized by the Atomic Energy Commission (AEC) to use 30,000 pounds of depleted uranium. (RA-124) By 1971, Chemetron's license was amended to allow it to use up to 600,000 pounds of uranium. (RA-151) Even after Chemetron ceased production of the catalyst, it was still permitted to maintain 750,000 pounds of uranium for storage purposes. (RA-152)

During Chemetron's ownership of the Toxic Sites and its use of radioactive material, it was cited numerous times for violations of regulations concerning the handling of radioactive material. None of these incidents ever received any publicity. During its ownership of the Toxic Sites, Chemetron's Director of Research was Dr. Charles E. Crompton, a former Atomic Energy Commission employee. Public records from the AEC and successor Nuclear Regulatory Commission (NRC) reveal that the NRC dropped its investigation into one of the charges against Chemetron because Dr. Crompton said that "in his mind" Chemetron was in compliance. (RA-303,307) The NRC also never followed through on its investigation into excessively high film badge readings based upon Dr. Crompton's stated belief that the film badges were otherwise contaminated. (RA-304)

There are other incidents of violations at the Toxic Sites which were never pursued by the authorities. However, Claimants have not had an opportunity in any Court to develop a record of Chemetron's culpability in this matter. The Cleveland Action has been stayed and no evidence was taken in the Bankruptcy Court in this matter. Claimants are prepared to make that record once given the opportunity.

The Toxic Sites are located immediately adjacent to a residential neighborhood. For many years, the Bert Avenue Dump was used by local children as a playground. It had a pond where the children swam and a swingset. Chemetron knew this when it filed its petition for Bankruptcy. Chemetron also knew, better than any regulatory agency, the type and extent of pollution it created in the area of the Toxic Sites.

In 1980, after Chemetron had sold the Toxic Sites to McGean Chemical Co. ("McGean"), a complaint was made to the appropriate agencies which was acted upon and generated media attention. Specifically, on May 13, 1980, the NRC was contacted by a resident of the neighborhood surrounding the Toxic Sites who was concerned about potential radioactive and hazardous dumping at the Toxic Sites. Individual "A" stated that he had obtained a chemical sampling of water from the Bert Avenue Dump and found it to be contaminated with radiation; that the ground in and around the dump site had turned a shade of green; that he noticed deformed birds in the area and that children who played in the vicinity of the dump had been diagnosed with "antinuclear" bodies in their blood. (RA-224) As a result of this contact, the NRC conducted an inspection of the Toxic Sites. The NRC took samplings in the dump on June 18, 1980 (RA-224, 235) and samplings of the surrounding neighborhood during the period of September 2-17, 1980. (RA-226,267). After its initial sampling in June of 1980, the NRC issued "immediate action" letters to McGean and Chemetron. (RA-249,250). McGean was ordered to repair the fence surrounding the Bert Avenue Dump and establish a patrol to assure that unauthorized persons did not enter the area. The NRC also ordered McGean and Chemetron to perform, in conjunction with each other, an assessment to determine the source of radioactive materials disposed of at the dump site. (RA-249,250) Chemetron's immediate action letter advised Chemetron of its duty to submit the results of the analysis to the NRC. (RA-250) The letter also indicated that "further actions will depend on the results of the assessment." (RA-250) McGean and Allegheny Ludlum Industries, Chemetron's parent corporation, hired NL Industries to obtain an analysis of radioactivity in the area and sent NL Industries' report to the NRC on July 24, 1980. (RA-251).

The NRC issued a report in November, 1980, summarizing its investigation and containing the results of the radioactive sampling conducted by itself and NL Industries. (RA-220) The NRC report concluded that Chemetron had hired contractors

who illegally deposited truck-loads of radioactive materials at the Bert Avenue Dump in 1975. The NRC issued a Notice of Violation to Chemetron which concluded that Chemetron had failed to adequately evaluate the radioactive materials which it deposited at the Bert Avenue Dump. (RA-226,251) This is the first time that the NRC followed through on any of its findings of violations against Chemetron. This was not the first time that Chemetron engaged in the hazardous activity which resulted in injuries to Claimants.

The NRC report included results from its June, 1980 investigation. Readings of radioactivity from .5 to 18 mrad/hour[2] were reported on various surfaces (RA-235). The NRC report also noted soil contamination of up to 2,400 pCi/gram of soil.[3] (RA-225). The NRC guideline for release for unrestricted use of an area contaminated by uranium-238 in soil is 35 pCi/gram. (RA-225) The background level for soil (i.e., the amount naturally occurring in the area) is less than 1.5 pCi/gram. (RA-179) The report also included the results of samplings taken by the NRC in September of 1980 from the dump and areas near the dump including the homes, yards and garages of twelve nearby residents and four streets. (RA-267) This survey uncovered actual pieces of uranium and contaminated stones, metal and concrete, some of which measured 21 mrad/hr. (RA-267)

The NL Industries report narrative stated that it found soil contamination in one area of up to 8,000 pCi/gram of soil. (RA-257) In the test results attached to the narrative report, the specific sample that the narrative referred to indicated that the actual reading was 8,513 pCi/gram of soil. (RA-258) Out of

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[2] mrad/hour refers to millirads per hour. A RAD is a radiation absorbed dosage. It is the unit for measuring the amount of radioactive energy taken in by an object.

[3] pCi/gram refers to picocuries per gram. A curie measures how much radioactivity is released by a substance.

twenty-two soil samples taken from the seven-acre dump site, fifteen of those reported in Table I registered in excess of the allowable limits of radioactivity. (RA-258). We do not know if the remaining seven samples reported on Table I measured within an allowable range because the equipment used by NL Industries could only compute readings over forty pCi/gram. (RA-254) One of the items tested for was alpha particles which are very dangerous because alpha particles do not pass through the human body, but remain there. They are the most dangerous particles for inhalation. Poisoned Power, John Gofman, Arthur R. Tamplin, Rodale Press, Inc., 1971, p. 60. Alpha particles were found to be present and the results were listed in the tables. However, mentions of this was conspicuously absent in NL's narrative.

The NL Industries report stated in its narrative that, "[t]he surface GM [Geiger counter] survey revealed several areas with detectable surface contamination." (RA-256) No mention was made of the amounts of contamination found, but the levels were shown in Figure 1 attached to the report. (RA-262) Surface GM measurements are reported in terms of disintegrations per minute (dpm). An acceptable level of surface GM is 15,000 dpm. (RA-334) Figure 1 showed surface GM readings of 22,000 dpm, 40,000 dpm, 100,000 dpm, 150,000 dpm, 300,000 dpm and 1,000,000 dpm. (RA-262) Those amounts were never mentioned in the narrative portion of NL's report and were never mentioned by any media source reporting on the results of radioactive testing.

On July 10, 1980, the United States Environmental Protection Agency (USEPA) also conducted an investigation of the site. (RA-76) The report stated there were potential hazards to human health, contamination of water supply, contamination of surface water, leaking containers and inadequate security. (RA-87) Orange colored leachate was noted at the site. (RA-74,81,89) The USEPA investigation did not include any investigation of radioactivity. (RA-73) The investigative report indicated that the site was very accessible to children and adjacent to a residential area. (RA-73) The Ohio

Environmental Protection Agency (OEPA) had a meeting with McGean Chemical in October of 1980 and made a summary of the USEPA's findings. The OEPA's summary noted that the USEPA had found trichlorethylene and other metals. It further stated:

> "The analytical data does not indicate an eminent human health hazard. However, the data compiled thus far is limited. Although there is no history of any organic chemical wastes being disposed here, more thorough organic analysis is needed to determine the pollution problems presented by this site. OEPA asked McGean to consider having priority pollutant scans run on a composite soil sample and the inlet and outlet of Burk's Branch." (RA-72)(Emphasis added)

McGean never conducted the testing and neither did Chemetron after Chemetron was ordered to assume responsibility for clean-up.

McGean was also asked to provide testing for the residents. A memorandum from McGean indicates that McGean consulted with the Cuyahoga County Board of Health who indicated that no tests were available to tell if children were exposed to radiation. (RA-282) The Memorandum indicated that children had been riding trail bikes at the dump site. (RA-283).

In 1980, Mrs. Barbara Looby, a neighborhood resident, became concerned when her daughter began experiencing physical ailments which her doctor believed could be related to exposure to toxic or radioactive substances at the dump. (R-Looby Deposition, p. 4)) Her doctor had written in a letter to a referring physician that he suspected the Toxic Sites may be "another miniature Love Canal." (RA-90). Mrs. Looby's deposition from a related proceeding is part of the record in this case. She testified that children played at the Bert Avenue Dump and that, except for a street gate, the area had not previously been fenced in. (RA-65,66)

The testing at this point in 1980 was minimal, but even that minimal testing indicated that toxic and radioactive contamination had occurred at the sites. The record contains a

sampling of the type of information that was provided to the residents through the media.

On July 8, 1980, the Cleveland Press reported that radiation readings of approximately 1 millirad per hour were observed at the site and that a piece of concrete at the site had registered 5 mrad/hour. (RA-289) In fact, the concrete registered 18 mrad/hour. (RA-235)

On July 9, 1980, The Cleveland Plain Dealer reported the same findings of 1 and 5 millirad per hour and included the following quote:

> "If you tied the chunk of concrete around your neck and trotted around 6 to 10 hours, the radiation would be equivalent to a chest x-ray. . . . A typical chest X ray involves 20 to 50 millirads." (RA-290)

On September 4, 1980, a meeting was held at Newburgh Heights Village Hall concerning the radioactive and hazardous substances at the Toxic Sites. Contrary to the test results, the paper reported that experts from the NRC said that the radiation was not serious and that it was confined to the Dump.(RA-291)

Back in 1980, clean-ups were ordered by the NRC and the EPA, (RA-110) which to this date have not been completed.

Despite the fact that at all times since 1980, the EPA and NRC have ordered that the site be cleaned up and that the site be guarded until it is cleaned up, the USEPA told a local resident in 1983 that "there is no serious radiation hazard to the surrounding neighborhood." (RA-281).

These were the reports which were provided to the residents of the area. Chemetron received the actual reports which revealed quite different findings than what was reported in the media and at public meetings.

At all times, Chemetron has been aware of the dangers to local residents caused by the substances it deposited at the Bert Avenue Dump and the substances it had allowed to escape from the Harvard Avenue Plant. Chemetron also knew from its own experience and reports that the residents in the neighborhood have been exposed over the years to large quantities of radioactive and harmful substances.

Chemetron's continued involvement with environmental matters at the Toxic Sites was also the subject of a recent Congressional Report from the United States General Accounting Office (GAO). The report summarized the history of the clean-up efforts at the Toxic Sites:

> "Little progress has been made toward the cleanup of the Bert Avenue and Harvard Avenue sites in the 21 years since Chemetron ceased operations using radioactive materials. Two cleanup attempts made in the 1980's failed because of NRC's inattention to the radioactive material licensee's cleanups, inadequate efforts to characterize (identify) waste at the site, a prolonged dispute between Chemetron and the current owner of the sites over who should assume financial responsibility for site cleanup, and Chemetron's financial problems and subsequent bankruptcy." (RA-95)

Chemetron initiated a clean-up effort in 1984. This clean-up attempt included shipping contaminated materials off site and demolishing the Harvard Plant building where operations using uranium had taken place. (RA-99) Chemetron had reported to the NRC in 1985 that clean-up was complete, but confirmatory testing by the NRC concluded that the ". . . radioactivity levels in some areas were three times as high as Chemetron reported." (RA-99) In fact, the Oak Ridge report referred to in the GAO report indicated radioactivity levels as high as 231,100 pCi/gram, of soil. (RA-198)

When Allegheny International filed bankruptcy in 1988, Chemetron informed the NRC that all of its assets were frozen and that no progress would be made on the cleanup until the Bankruptcy Court released money for the cleanup. (RA-101)

After Chemetron's funds were released in 1989, a cleanup attempt was begun by Chemetron using a method that was not approved by the NRC. (RA-100) Chemetron dismissed the cleaning contractor involved in this effort when "larger-than-anticipated amounts of radioactive material were discovered." (RA-100)

In 1990 Chemetron initiated a third cleanup attempt which began with an effort to identify the hazardous substances at the site. (RA-101) The NRC and OEPA found Chemetron's analysis of radioactive and hazardous substances at the site to be inadequate. (RA-101) Ten years had passed since Chemetron had been ordered to identify the radioactive and hazardous substances at the site.

Increased levels of radiation as well as new areas of contamination continue to be reported at the Toxic Sites. The Cleveland Plain Dealer, on April 29, 1993, (RA-296) reported that radioactive hot spots were located on the roof and air ducts at an ALCOA plant located near the Harvard Plant. This contamination is being attributed to Chemetron's conduct when it was in business at Harvard Avenue. The article's report of contamination on the ALCOA roof is supported by documents from the NRC. (RA-142) The article quotes the NRC as saying the contamination ". . . probably was not a threat to workers or neighbors 'but again, that something we have to look into.'" (RA-296) The article also noted that Chemetron was still avoiding its responsibility for the contamination and its clean-up.

It should appear suspicious to any reader of this history that the reported contamination levels continued to grow even after the Toxic Sites were not being used and even after loads of contaminated materials had been removed from the sites. What started out as a report of a couple of truckloads of contaminated rubble illegally dumped in 1975, by 1993 was reported by Chemetron as 1,300,000 cubic feet of contaminated soil. (RA-150) Obviously, the original reports were wrong. How wrong remains unknown.

The Congressional Report also makes it clear that the NRC was not a vigilant watchdog and that both the NRC and EPA were waiting for Chemetron to provide them with a final analysis of the hazardous and radioactive materials at the Toxic Sites.

By 1990, even the regulatory agencies admitted that they had failed at the Toxic Sites. On August 13, 1990, Inside N.R.C. (Vol. 13, No. 17, Pg. 5) (RA-144) included an article

concerning a report generated by 1989 Congressional hearings led by Representative Mike Synar (D.-Okla.). The report concerned the NRC's policies for releasing contaminated sites from licensing control. It had been discovered that several sites which were released should not have been released and still contained excessive amounts of radiation. (RA-144) The article noted that the General Accounting Office charged the NRC with "sloppy habits" and "ambiguous or incomplete" files. (RA-144) The NRC admitted to these deficiencies. (RA-146) As a result of the hearings, the NRC compiled a list of what it refers to as "Synar Sites," which require special attention for clean-up before release. The "Synar Sites" are divided into three categories, with "Level A" sites being the worst. (RA-146) The Toxic Sites at issue in this case were designated as "high priority" Level A on the Synar Sites list. (RA-146-147)

The Claimants' Injuries

Claimants' injuries were caused by their exposure or their parents' exposure to radioactive and hazardous materials during the time that they lived in the vicinity of the Toxic Sites. (RA-6-20). Some of the Claimants are minors who were not even born in 1980. (RA-6-20)

The effects of long-term exposure to radiation and hazardous substances often take years to mature into identifiable injuries. Only recently were claimants able to identify the connection between their illnesses and their exposure to the Toxic Sites. Despite the misinformation being provided to the residents in the area of the Toxic Sites, Claimants finally determined that their illnesses were caused by Chemetron's conduct.

In 1990, Phyllis Jaskey Jones was contacted by a reporter for The Cleveland Plain Dealer concerning its investigation of the Toxic Sites. After this contact, Ms. Jones undertook an investigation and, in 1991, learned that her health problems were caused by the hazardous wastes at the Toxic Sites. (RA-20) At the same time Pamala Jo Swansinger, Sandra Hujarski, Patricia Hujarski, Janice Jaskey Butvin, Frank Butvin, Robert

Butvin, Brian Butvin, Susan Butvin, Walter Anielski, Arlene Vans, Yvonne Vans Bekoscke, Anthony Vans, Gregory Vans, Carol Schultz and Theresa Hujarski Ross learned that their injuries were also caused by the hazardous substances from the Toxic Sites. (RA-20-21)

On March 17, 1992, while visiting her family in Cleveland, Ohio, Mary Schaffer drove down East 29th Street to show her family where she had lived as a child. On that day she saw, for the first time, the fence erected around the Bert Avenue Dump and a sign that warned of the hazardous radioactive waste present at the dump. Mary Schaffer contacted an attorney and as a result of information obtained following an investigation by counsel and consultants, Mary Schaffer learned for the first time in March of 1992 that exposure to the radioactive and toxic substances present at the Toxic Sites Avenue Plant were a direct and proximate cause of the serious health problems suffered by herself and her minor children, Brittany Cull, Stephanie Schaffer, Amanda Schaffer and Ivan Schaffer. (RA-21)

As a result of this knowledge, Claimants filed the Cleveland Action in July of 1992. Appropriate allegations concerning the manner in which Claimants learned of their illnesses and their relation to the exposure at the Toxic Sites are recited in their Complaint in the Cleveland Action. Claimants are afflicted with serious illnesses and injuries including physical deformities, cancer and lupus. Three Claimants who grew up in this area required hysterectomies before they were thirty-five years old. Claimants are prepared to go forward in the Cleveland Action and prove the facts surrounding the discovery of their illnesses and prove that their injuries were caused by exposure to radioactive and hazardous substances at the Toxic Sites.

Chemetron's Bankruptcy Proceeding

Chemetron filed a voluntary Chapter 11 petition with the Bankruptcy Court for the Western District of Pennsylvania on February 20, 1988 as a subsidiary of Allegheny International, Inc. It did not list persons exposed to hazardous substances at the Toxic Sites on any of its schedules of debts despite its

knowledge of contamination of the area of the Toxic Sites and despite its knowledge that the conditions it created at the Toxic Sites continued to be in existence. Chemetron did list potential cleanup costs at the Bert Avenue Dump site, but made no mention of the potential harm it caused to residents. The Bankruptcy Court fixed the bar date for claims at May 31, 1988. No actual notice was given to persons in the vicinity of the Toxic Sites of either the filing of the Bankruptcy Petition or of the claims bar date, despite the fact that the area is small and easily identifiable and despite the fact that Chemetron actually knew the names and addresses of many of the residents in the area. No constructive notice other than publication was attempted. Notice by publication in the Cleveland area was made in the national editions of The New York Times and Wall Street Journal, using the caption of the bankruptcy case which is headed with "Allegheny International, Inc." No notice by publication of any kind was placed in The Plain Dealer, or the Neighborhood News, both of which are newspapers in general circulation in the area of the Toxic Sites. The Bankruptcy Court approved this notice because it was never apprised of the fact situation regarding the Toxic Sites. (A-26)

Claimants were unaware of Chemetron's bankruptcy proceeding until Chemetron filed its Motion to Dismiss in the Cleveland Action. They received no notice of any kind designed to apprise them of the pendency of the bankruptcy.

The Decisions Below

This section describes the decisions of the Courts below on the issue of whether Claimants were "known creditors" entitled to actual notice.

On July 2, 1993, the Bankruptcy Court granted Claimants' Motion to Allow Late Filed Claims finding that the Claimants were known creditors, and thus, entitled to actual notice of the bankruptcy proceeding and the claims bar date. In reaching this result, the Bankruptcy Court relied on In re Remington Rand Corp., 836 F. 2d 825 (3rd Cir. 1988) and Brooks Fashion Stores, Inc. v. Michigan Employment Security Comm., 124

B.R. 436 (Bkrptcy., S.D.N.Y., 1991), 444. The Bankruptcy Court applied the following test to determine if Claimants were "known creditors":

> ". . .if at the time of filing it is reasonably foreseeable to a debtor, who is or should be aware of the potential consequences of its actions, that a party that is foreseeable will most likely file a claim against the debtor, that party is a 'known' creditor of the debtor. Furthermore, the fact that a debtor does not know the name and address of a creditor does not prevent that creditor from being 'known.'"

Applying this standard, the Bankruptcy Court noted Chemetron's knowledge of the fact that the Bert Avenue Dump was used by local children as a playground. The Bankruptcy Court also relied upon Chemetron's own statement in its brief that:

> "The early 1980's stand out as a point beyond which no reasonable person should have failed to suspect a potential connection [between the Bert Avenue Dump and local health problems] because of the blizzard of media and individual attention focused upon the alleged injuries supposedly caused by exposure to hazardous substances from the Bert Avenue site. . . ." (A-24-25)

The Bankruptcy Court held:

> ". . .at the time AI [Allegheny International, Inc.] filed for Chapter 11 protection in 1988, it was reasonably foreseeable that Chemetron would suffer claims from the residents surrounding the Bert Avenue Dump. Consequently, this court concludes that the Plaintiffs were known creditors who were entitled to actual notice." (A-25)

The Bankruptcy Court specially noted that when it approved the notice order which was used in Chemetron's bankruptcy proceeding it was ". . . not apprised of Chemetron's fact situation. . .". (A-26)

Relying on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)., the Court

concluded that ". . . Notice by Publication in the New York Times and Wall Street Journal was not 'reasonably calculated' to give notice to. . ." Claimants. (A-25-26) The Court went on to suggest various alternative forms of notice which would have been calculated to provide the Claimants with notice such as publication in the local paper, a mailing to the homes in the area of the Bert Avenue Dump or posting notices in the neighborhood. (A-26) The Bankruptcy Court granted Claimants relief from the automatic stay in order for them to proceed with the Cleveland action. (A-29)

Chemetron appealed to the District Court, asserting challenges to the Bankruptcy Court's decision granting Claimants' Motion to Allow Late Filed Claims. The District Court reversed the Bankruptcy Court and determined that Claimants were "unknown creditors." The District Court criticized the foreseeability test, but did not substitute another test. Instead, the District Court held that:

> ". . . absent some course of dealing or some communication between a debtor and potential claimant indicating the viability of a claim, a creditor is not reasonably foreseeable. Appellees did not produce any evidence which suggests a course of dealing between Chemetron and Appellees or a similarly situated resident during the relevant time period. . . . It is uncontroverted that between 1980, when the NRC first informed Chemetron of unpermitted disposition of radioactive materials at the Bert Avenue Site, and February, 1988, no one filed a claim or expressed an intention to file a claim against Chemetron." (A-39)

Thus, according to the District Court, a tort claimant is not foreseeable unless the tort claimant "filed a claim or expressed an intention to file a claim against Chemetron."

The Third Circuit Court of Appeals rejected the "foreseeablity test" applied by the Bankruptcy Court and held that the appropriate test was the "reasonably ascertainable" standard, which it described as follows:

"only those claimants who are identifiable through a diligent search [of the debtor's own books and records] are 'reasonably ascertainable' and hence 'known' creditors." (A-8)

The Third Circuit did not define "identifiable" but later states "we are hard-pressed to conceive of any way the debtor could identify, locate and provide actual notice to these claimants." (A-9) The suggestion made by the Third Circuit Court of Appeals by this statement is that the debtor must have the names and addresses of individual claimants in order for them to be ascertainable.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to resolve conflicts among the Circuit Courts in defining a standard for determining whether a creditor is "reasonably ascertainable" and hence, "known" for purposes of bankruptcy proceedings.

In the decision below, the Third Circuit essentially held that in order for a creditor to be "reasonably ascertainable", the debtor, from an examination of its own books and records must be able to identify, locate and provide actual notice to the individual tort claimants. The decision suggests that the debtor must have an actual name and address of a particular claimant before the claimant can be considered a "known creditor".

In the Third Circuit's decision, one judge dissented and concluded that the "reasonably foreseeable" test should be used to determine which persons are entitled to receive notice and the "reasonably ascertainable" test should be used to determine what kind of notice they receive. Explaining further, he stated:

"The 'reasonably foreseeable' test has to do with whether the debtor knew or should have known that a claim would be brought; the 'reasonably ascertainable' test has to do with the debtor's ability to learn the

identity and location of the potential claimant or claimants." (A-17)

The dissenting judge gave the following example:

"The manufacturer of a product which it knows to be defective and who filed for bankruptcy should be under an obligation to give actual notice of the proceedings to known purchasers and users of its products, even if they have made no claim. They may not have done so because the injury had not yet manifested itself or they otherwise were unaware of the risks of such injury. Absent such requirement, if the harmful effects of the product did not manifest themselves for some period of time, consumers could be barred from relief for their injuries." (A-17)

The opinion of the dissenting judge below is consistent with the standard held applicable by the Tenth Circuit in Sheftelman v. Standard Metals Corp., 839 F. 2d 1383 (10th Cir. 1988). At issue in Sheftelman was whether the debtor in bankruptcy was required to notify the purchasers of industrial revenue bonds issued for the benefit of one of its subsidiaries. The Tenth Circuit promptly reached the conclusion that notice was required, stating:

"Notice must be given to 'all creditors'. . . . The term 'all creditors' has no qualifications or limitations. New York v. New York, New Haven & Hartford Railroad Co., 344 U.S. 293, 73 S. Ct. 299, 97 L. Ed. 333. This notice must also be given to satisfy due process requirements. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865. We are referring to actual notice to *known creditors*, and these are creditors whose actual identity is known and those within an identified group or category as were the bondholders of the particular bond issue here concerned and whose addresses are 'reasonably ascertainable.' Something by way of constructive notice must also be given to those bondholders in the same group whose identity and

whereabouts cannot be ascertained." (Emphasis by underlining, added)

Thus, the Tenth Circuit holds that in order to be a known creditor, it is only necessary that the creditor be in an identifiable "class". The type of notice the known claimant should receive depends on whether the name and address of the person can be ascertained. Notably, in Sheftelman, the Court concluded that names and addresses were known because there was evidence that the indenture trustee had a list of most of the names and addresses of the bondholders. The Tenth District did not find that the bondholders were not ascertainable merely because the list of names and addresses was not in the debtor's records. What was in the debtor's records was knowledge of the class and the names and addresses were someplace where the debtor could get them.

The First Circuit Court of Appeals considered the type of notice to be given to potential tort claimants in a bankruptcy case in In re Savage Industries, Inc., 43 F. 3d 714(1st Cir. 1994). In Savage, the debtor was a firearms manufacturer which sold its assets to an Alaskan company. Alaska had a successor products liability statute. The debtor made no effort to notify potential tort claimants of its pending bankruptcy. When the debtor was sued in state court, it sought and obtained an injunction from the Bankruptcy Court to prevent the state court action. The Bankruptcy Court's action was reversed by the District Court and the State Court action was allowed to proceed. The Circuit Court affirmed because no notice had ever been given to potential tort claimants. The First Circuit rejected the debtor's defense that notice was impossible because the creditors were unknown and locating such creditors would have been overly burdensome. The Court noted that even though the names of all potential tort claimants were not known to the debtor, the debtor did have in its records ". . . either the identity or the whereabouts of large-volume firearms distributors like Western Auto. . . ." Id., at 721.

The Court in Savage unambiguously determined that the potential tort claimants were entitled to notice and, absent such notice, their claims were not discharged:

> "Notice is the cornerstone underpinning Bankruptcy Code procedure. ... Under the Code, therefore, the debtor in possession or trustee must ensure 'parties in interest' adequate notice and opportunity to be heard *before* their interests may be adversely affected. . . . '[N]otice. . . means . . . . such notice as is *appropriate in the particular circumstances*. . . . ' Bankruptcy Code § 102(1) is founded in fundamental notions of procedural due process [citations omitted]. . . Since Taylor and Western Auto [the tort claimants],as "parties in interest," were never afforded "appropriate" notice of the chapter 11 proceeding, the chapter 11 plan, or the privately negotiated terms of the asset transfer agreement, not only do their state-law based successor liability claims against Arms survive the chapter 11 proceeding but their claims against Debtor Industries as well."

While the Court in Savage recognized that direct, actual notice would probably not be possible for all of these claimants, it was particularly influenced by the fact that the debtor had never made any attempt to bring up the issue in the Bankruptcy Court. In strong language, the Court stated:

> "As it was never determined 'appropriate in the particular circumstances' for Debtor Industries and Arms to dispense with all notice and opportunity to be heard on the part of potential claimants like Taylor and Western Auto, it would border on the bizarre to conclude that the third-party complaint Western Auto filed against Arms in Alaska state court threatened disruption to any legitimate function served by the Bankruptcy Code priority scheme which Debtor Industries and Arms subverted in their private negotiation of the asset transfer agreement. Furthermore, it cannot seriously be questioned that the

> central 'notice and hearing' requirement prescribed by the Bankruptcy Code would be eviscerated were we to *presume* as Arms belatedly suggests, that an entire class of future product liability claimants was beyond the purview of 'such notice . . . and such opportunity for a hearing as [was] appropriate in the particular circumstances. . . ." Id. at 722.

Thus, this summary of cases demonstrates that a conflict exists among the circuit courts as to what test should be employed in determining whether a creditor is "ascertainable" and thus, "known" for purposes of bankruptcy. The issue is likely to recur, particularly where the creditor is a tort claimant.

II.

Certiorari should be granted to illustrate the appropriate application of the standards of due process set forth in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306,70 S. Ct. 652, 94 L. Ed. 865 (1950), to bankruptcy proceedings.

A significant aspect of the decision of the Court below, in determining that Claimants were not known creditors entitled to notice of Chemetron's bankruptcy, was its determination that providing a form of effective notice would be too burdensome. This analysis is incorrect because it places the cart before the horse. The first inquiry should be whether there exists a known class of potential tort claimants entitled to notice of the pending bankruptcy proceeding. The second inquiry, after the first is resolved and presented to the bankruptcy court, is what type of notice would suffice. The Court in Savage, supra., employed an analysis which did not confuse the two issues. First, the Court concluded that an ascertainable class of claimants existed which should have been brought to the attention of the Bankruptcy Court. Second, the Savage Court held that Mullane should have been employed to devise an appropriate form of notice for those claimants.

The Bankruptcy Court in this case, likewise, first made the determination that Claimants' claims were foreseeable and their existence should have been presented to the Bankruptcy Court before a notice was devised. Second, the Bankruptcy Court proposed a notice to service this class of foreseeable claimants. The Bankruptcy Court had no difficulty in proposing several alternatives for providing notice and noted that the suggested alternatives were by no means considered to be exhaustive.

Both the Circuit Court and District Court below, as well as other courts addressing this issue, appear to adopt the following rationale: Actual notice means mailed notice to specific individuals at a specific address. If that cannot be accomplished, then the creditor is unknown and constructive notice suffices. Constructive notice equals publication notice.

This rationale is wrong. The question of whether a creditor is a known creditor is not determined by what kind of notice can be accomplished.

More germane to this argument, Mullane stands for the proposition that in order to be effective notice must be:

> ". . .reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." Id., 313-314 (U.S.)
>
> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id., at 315 (U.S.)

The Circuit Court hung its hat on the following language taken out of context from Mullane:

> "Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or,

although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee." Id., at 317 (U.S.)

The Mullane decision, taken as a whole, defies such a wooden interpretation based upon one sentence of its decision. Indeed, in the very next sentence, Mullane recognizes that a more thorough search may be appropriate ". . . in another situation under ordinary standards of diligence . . . ." Id.

In Matter of Park Nursing Center, Inc., 766 F. 2d 261 (6th Cir., 1985), the Court construed Mullane as imposing a ". . . balancing procedure in which costs and efficiency considerations are balanced against the probability that a procedure will effectuate notice." Id., at 263. Even if the notice is constructive, it should be designed to notify.

Chemetron would have incurred very little cost in notifying every resident in Newburgh Heights and Cuyahoga Heights. It is unlikely that the cost would have affected the ultimate recovery of any other creditor. That cost would have been even less if just the residents of streets near the Toxic Sites had been notified. The cost to run additional ads in local papers is minuscule. The Bankruptcy Court in its order also suggested other methods of notice such as posting notices in the area which would have imposed minimal burdens upon Chemetron. In comparison with the costs of depriving numerous tort claimants of their right to have their claims heard, the cost of effective service in this case was minimal. Clearly, the balancing test weighs in favor of providing adequate notice to the claimants and the Bankruptcy Court's determination in that regard should be upheld.

No effective balancing test occurred when the original notice order was issued because Chemetron failed to tell the Bankruptcy Court of the dangers to human health it had created. The rights of Claimants and others in the area of the Toxic Sites were never considered.

The Bankruptcy Court recognized that Chemetron failed to provide notice to Claimants who were known creditors and correctly ruled that Claimants could file their late claims.

Clearly, the Mullane holding requires an examination of each specific situation on its own facts. Under the facts of the case at bar, Chemetron did not have to go any further than its own records to discover that it had left harmful radioactive and toxic substances in a residential neighborhood and specifically in a dump that was used as a children's playground for many years. The area involved was a few streets of homes. As the bankruptcy court concluded, some form of notice could have been devised. None was attempted.

The notice in this case was not one designed to actually inform, instead it was designed to create a hazard of forfeiture. Notice was given in The Wall Street Journal and The New York Times under a caption heading with Allegheny International, Inc. In the greater Cleveland area (i.e., Cleveland and suburbs), there are 1,416,017 residents. In northern Ohio, which includes Akron and Canton, the total circulation of the New York Times is 6,574 on weekdays and 8,876 on Sundays. The Wall Street Journal keeps records of its circulation in the area of Cleveland, Pittsburgh, Northern Ohio and Western Pennsylvania and the total circulation for that area is 55,000. Counsel for Claimants spoke to the circulations departments of these newspapers and asked if circulation figures were available for the area of Newburgh Heights and Cuyahoga Heights, which would be the areas affected by the Toxic Sites. No records were kept for this small area. Indeed, no records were kept for Cleveland alone. Thus, we cannot ascertain how many of the 6,574 New York Times and 55,000 Wall Street Journals go to residents of these areas. It is fairly common knowledge, however, that these newspapers are not generally read by residents in the area of the Toxic Sites, which is a working class neighborhood.

No notice by publication was made in The Cleveland Plain Dealer or the Neighborhood News, both of which are newspapers in general circulation in the area of the Toxic Sites and would have more likely been seen by those in the area. No notice was made emphasizing that Chemetron was one of the debtors. The notice provided in the Wall Street Journal and the

New York Times was not calculated to give Claimants any notice whatsoever.

Newburgh Heights and Cuyahoga Heights have a combined total population of 3,700. Actual Notice to 3,700 individuals would not have been unduly burdensome to Chemetron. Yet that type of notice was not provided. Actual notice to the residents on the few streets adjacent to the Toxic Sites would not have been burdensome at all to Chemetron. Yet, no attempt was made to notify those residents in the immediate vicinity of the Toxic Sites. Had such notice been made Claimants would have heard about it because they maintain contact with people in the neighborhood. All of the claimants except Mary Schaffer and her children still live in the Cleveland area. Mary Schaffer's family is still in the Cleveland area and would have advised her of any notice they had seen or heard about.

The Bankruptcy Court specially noted that it was Chemetron which proposed the notice order in this case and that it did so without apprising the Court of the facts concerning the Toxic Sites (A-26). Apparently, when Chemetron proposed the notice order in its bankruptcy proceeding, it never told the Bankruptcy Court that the Toxic Sites were located adjacent to a residential area, that the area had not been adequately fenced off, that warning signs were not posted until some time in the 1980's and that Chemetron knew that children had played in the contaminated rubble for years before the NRC ever conducted the 1980 investigation of the site. Nor did Chemetron inform the Court that their own records showed that large amounts of radioactive particles were allowed to escape from the plant to the neighboring residences between 1966 and 1975 where the particles were inhaled or deposited on fruit trees and vegetable gardens in the area.

The Bankruptcy Court's discussion of alternatives for adequate notice in this situation makes it apparent that had the Bankruptcy Court been advised of this class of known claimants, it would have devised some notice designed to advise them of the pendency of the Bankruptcy proceeding.

There are numerous cases where bankruptcy debtors have devised special notice for potential tort claimants when the debtor is seeking relief from liability for those torts in its bankruptcy proceeding. In those cases where a class of potential claimants exists because of known hazardous conduct by the debtor, special considerations are made in the bankruptcy proceeding to insure that their interests are represented. See, e.g., In re Amatex Corporation, 755 F. 2d. 1034 (3d Cir., 1985); In re Penn Central Transportation Co., 42 B.R. 657 (D.C. Pa., E.D., 1984).

In Savage Industries, supra, the First Circuit held that the debtor should have brought the class of potential claimants to the attention of the Bankruptcy Court in order to devise a form of notice.

The serious hazards to which Chemetron exposed the residents of this small residential area adjacent to its Toxic Sites demanded more than publication in the Wall Street Journal and New York Times, and the Bankruptcy Court correctly found that the notice given was inadequate.

In determining what notice is adequate, a court is required to balance the interests of the creditors to be notified against the interests of the debtor and other creditors in preserving funds to use for the payment of claims. The decision of the Court below was, admittedly, made without balancing their interests in the consideration. (A-11)

III.

Certiorari should be granted to construe the duties of a debtor in bankruptcy with respect to potential victims of its ultrahazardous conduct.

A creditor is defined by Bankruptcy Code Section 101(10) as "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." Section 101(5)(A) of the Bankruptcy Code defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

unmatured, disputed, undisputed, legal, equitable, secured or unsecured." In In re Remington Rand Corp., supra, the Court reviewed this language at 829:

> "By defining claim in these terms, Congress opted for an expansive treatment, thereby eliminating the 'provability and allowability' requirements of the Bankruptcy Act of 1898. In re Johns-Manville Corp., 57 B.R. 680,686 (Bankr. S.D.N.Y. 1986). Indeed Congress unambiguously stated its intent to address all possible legal obligations in defining a bankruptcy claim:
>
> The effect of the definition is a significant departure from present law. . . . the definition is any right to payment whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. . . . By this broadest possible definition and by use of the term throughout the title 11, . . ., the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." [citations omitted.]

In the context of bankruptcy proceedings, "claim" has been construed to include classes of future claimants in many situations. In re Amatex Corporation, supra., -(future asbestos claimants); In re Penn Central Transportation Co., supra., -(future CERCLA Claims); In re: Savage Industries, Supra. -(future products liability claimants).

The question in this appeal is when must a future tort claim be scheduled and future tort claimants notified as a condition to the discharge of their claim in bankruptcy.

A debtor's duty in fulfilling the requirements regarding the listing of creditors is that it must ". . .in good faith file its petition with as thorough a schedule of debts as possible." Brooks Fashion Stores, Inc. v. Michigan Employment Security Comm., supra., 444.

The question in this case is how can Chemetron in good faith file a schedule of debts without listing potential victims of its ultrahazardous conduct. The resolution of this question does not hinge upon an appellate court's factual conclusion that Chemetron relied upon statements made by the NRC that no harm was posed by its conduct. That statement is as ludicrous as one to the effect that an asbestos manufacturer has no knowledge that people who inhaled asbestos fibers got sick based upon a press release the asbestos manufacturer prepared for the newspapers.

No evidence was ever taken on this issue. The Bankruptcy Court correctly deemed it unnecessary. Chemetron, as a handler of ultrahazardous materials and an owner of property with knowledge of how that property was used should be imputed with the knowledge of the hazards of its activities. More importantly, if evidence on this issue was considered necessary, the matter should have been remanded to the Bankruptcy Court for a full evidentiary hearing. Claimants are confident that if a full hearing on this issue was ever held, Chemetron's knowledge of the extent of contamination in the area and its potential for harm would be firmly established.[4]

For purposes of determining whether Chemetron may seek a bankruptcy discharge of its liability to individuals who are harmed by the natural and probable consequences of Chemetron's unlawful handling of ultrahazardous materials, we think such a factual determination is unnecessary. If Chemetron did not know how dangerous its conduct was, it should have known.

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[4] Because the District Court made this factual determination, Claimants submitted other documentary evidence on appeal to the Circuit Court showing that Chemetron had a long history of violating nuclear regulations at the Toxic Sites and of providing the NRC with incorrect information showing less than the actual contamination at the sites.

A corporate debtor should not be able to manipulate the bankruptcy process to avoid the consequences of its unlawful conduct. The Bankruptcy Code was not enacted with that purpose in mind. A debtor is not entitled to a "fresh start" unless it has been fair and open to its creditors.

CONCLUSION

For all the reasons stated Claimants pray that this Court grant a Writ of Certiorari to review the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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Reported at: Chemetron Corp. v. Jones, 72 F. 3d 341 (3d Dir. 1995)

Filed December 18, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3371

CHEMETRON CORPORATION

v.

PHYLLIS JASKEY JONES; PAMELA JO SWANSINGER; SANDRA JASKEY HUJARSKI; PATRICIA HUJARSKI; TERESA HUJARSKI ROSS; JANICE JASKEY BUTVIN; FRANK BUTVIN; ROBERT BUTVIN; BRIAN BUTVIN; SUSAN BUTVIN; WALTER ANIELSKI; ARLENE VANS; YVONNE VANS BEKOSCKE: ANTHONY VANS; GREGORY VANS; CAROL SCHULTZ; MARY SHAFFER; BRITTANY CULL; STEPHANIE SCHAFFER,
Appellants.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 93-cv-01582)

Argued February 3, 1995

Before: SCIRICA, ROTH and SAROKIN, *Circuit Judges*

(Opinion Filed December 18, 1995)

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OPINION OF THE COURT

ROTH, *Circuit Judge:*

In this appeal, we consider whether a group of former residents and occasional visitors to a neighborhood containing a toxic site were "known" creditors entitled to actual written notice of the debtor's bankruptcy filing and bar claims date. We hold that the members of this group were not known creditors and that therefore publication notice satisfied the requirements of due process. However, we also conclude that the district court failed to adequately consider whether the group's late filing was due to "excusable neglect" and that the district court improperly

reached the issue of whether their claims had been discharged. Accordingly, we will affirm the district court's finding that notice was sufficient but reverse its findings on excusable neglect and discharge.

Beginning in 1965, appellee Chemetron Corporation ("Chemetron") owned and operated a manufacturing facility on Harvard Avenue in Cuyahoga Heights, Ohio, as well as a nearby landfill on Bert Avenue in Newburgh Heights, Ohio. From 1965 to 1972, Chemetron manufactured an antimony oxide catalyst at the Harvard Avenue facility in a process that utilized depleted uranium. After catalyst production ceased in 1972, a portion of the Harvard Avenue facility was demolished. In 1975, Chemetron placed a quantity of rubble from the Harvard Avenue demolition in the Bert Avenue landfill. Later in 1975, Chemetron sold both sites to McGean Chemical Company. McGean Chemical Co. subsequently merged with Rohco, Inc., to become McGean-Rohco, Inc., the current owner of both sites.

Beginning in 1980, potential problems at the sites received significant attention from major newspapers in the Cleveland area. On July 8, 1980, the *Cleveland Press* reported on radiation levels at a site "near Harvard Avenue" in Newburgh Heights. On July 9, 1980, the *Cleveland Plain Dealer* published a similar article. Related articles appeared in *The Plain Dealer* on September 5 and September 12. On September 23, 1990, *The Plain Dealer* ran a front-page article on "Cuyahoga County's only known radioactive dump." App. at 289-95. The September 23 article quoted Phyllis Jones, the lead plaintiff in this case, discussing problems at the sites. *Id* at 295.

Between 1980 and 1988, Chemetron was involved in periodic clean-up efforts at both sites at the direction of Nuclear Regulatory Commission. The efficacy of these efforts remains dubious.

On February 20, 1988, Chemetron and other debtors filed a joint petition for reorganization under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Western

District of Pennsylvania. Following Bankruptcy Rule 3003(c)(3), the bankruptcy court issued a bar date order, fixing the bar claims date at May 31, 1988. Stated simply, under bankruptcy law, the bar claims date is the last day on which existing claims can be filed against the debtor. *See* discussion Part III, *infra*.

The bar date order required that actual notice be provided to all persons known to have claims against the debtors. The order required notice to all other claimants by publication in the national editions of the *New York Times* and *Wall Street Journal*. It is undisputed that the debtors complied with the order and, in addition, voluntarily published notice in seven other newspapers in areas where they were doing business at the time of filing. On July 12, 1990, the bankruptcy court confirmed Chemetron's reorganization plan.

On March 2, 1992, almost four years after the bar claims date, twelve years after the first newspaper articles detailing problems at the sites, and two years after her comments in *The Plain Dealers's* front page article, Phyllis Jones and fourteen other individuals brought suit against Chemetron, McGean Chemical Co., and McGean-Rohco, Inc., in the Court of Common Pleas of Cuyahoga County, Ohio. The suit was later amended to name a total of twenty-one plaintiffs. The gravemen of the complaint alleged injury from exposure to toxic chemicals as a result of time spent in the Bert Avenue area.

Plaintiff's ties to the Bert Avenue area centered around visits to or occupancy of two houses in the vicinity. Only two members of the group actually occupied the properties during the period from 1965-1975 when Chemetron owned the sites. The other members of the group visited the properties periodically, ranging from "several times per week," *App.* at 8, to "weekly," *App.* at 14, to "monthly," *App.* at 16, to "occasional" visits, *App.* visits, *App.* at 9. The record indicates that the visits stopped in 1985, three years prior to Chemetron's bankruptcy petition. None of the plaintiffs currently resides near either site. Sixteen of the plaintiffs still reside in Ohio. Five of the plaintiffs live in Texas.

In the state court action, Chemetron moved to dismiss the suit, arguing that any such claim had been discharged in bankruptcy. The plaintiffs responded by seeking permission from the bankruptcy court to file late claims. By separate motion, plaintiffs sought a declaration from the bankruptcy court that their claims had not been discharged by the reorganization plan. This second motion was converted to an adversary proceeding.

On August 2, 1993, the bankruptcy court granted the motion to file late claims, finding that plaintiffs were known creditors entitled to actual notice of the bankruptcy proceeding and bar claims date. The bankruptcy court also, *sua sponte*, permitted the plaintiffs to proceed against Chemetron in the Ohio lawsuit and dismissed without prejudice the adversary proceeding.

Chemetron appealed to the district court, which reversed the grant of the motion to file late claims. The district court held that plaintiffs were not known creditors and that publication notice was sufficient. The district court then concluded, without explanation, that plaintiffs' "claims were dischargeable and were discharged." *Chemetron v. Jones* (*In re Allegheny Int'l*, 170 B.R. 83, 90 (W.D. Pa. 1994). This appeal followed.

II.

Jurisdiction in this appeal is proper pursuant to 28 U.S.C. § 158(d). We review the bankruptcy court's findings of fact for clear error, the same standard of review used by the district court. See *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981). When reviewing mixed questions of law and fact, we exercise plenary review over the bankruptcy court's choice, interpretation, and application of the underlying rule of law. *See Mellon Bank, N.A. v. Metro Communications. Inc.*, 945

F.2d 635, 642 (3d Cir. 1991), *cert. denied*, 503 U.S. 937 (1992).

III.

The central issue before us is whether plaintiffs were "known" or "unknown" claimants at the time of the bankruptcy court's order. If claimants were "known" creditors, then due process entitled them to actual notice of the bankruptcy proceedings. Absent such notice, their suit may proceed. If claimants were "unknown" creditors, however, then notice by publication was sufficient to satisfy the requirements of due process and their claims are barred, absent some other basis for relief. We hold that the claimants in the instant case were "unknown" creditors.

Our inquiry is guided by one of the principal purposes of bankruptcy law, to secure within a limited period the prompt and effectual administration and settlement of the debtor's estate. *Katchen v. Landy*, 382 U.S. 323, 328 (1966). To this end, Bankruptcy Rule 3003(c) requires that claimants against an estate in bankruptcy under Chapter 11 file timely proofs of claim in order to participate in a reorganization. Under Rule 3003(c)(3), these proofs of claim must be filed prior to a bar date established by the bankruptcy court. After the passage of the bar claims date, a claimant cannot participate in the reorganization unless she establishes sufficient grounds for the failure to file a proof of claim. *See In re Best Products Co.*, 140 B.R. 353, 357 (Bankr. S.D.N.Y. 1992). Except for narrow statutory exceptions not relevant here, confirmation of the debtor's reorganization plan discharges all prior claims against the debtor. 11 U.S.C. § 1141. Charter Crude Oil Co. v. Petroleos Mexicanos (*In re Charter Co.*), 125 B.R. 650, 654 (M.D. Fla. 1991).

Inadequate notice is a defect which precludes discharge of a claim in bankruptcy. Due process requires notice that is "reasonably calculated to reach all interested parties, reasonably conveys all the required information, and permits a reasonable time for a response." *Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg., Inc.)*, 62 F.3d 730, 735 (5th Cir. 1995) (citation omitted). For notice purposes, bankruptcy law divides claimants into two types, "known" and "unknown." *In re Charter Co.*, 125 B.R. 650. 654 (M.D. Fla. 1991). Known

creditors must be provided with actual written notice of a debtor's bankruptcy filing and bar claims date. *City of New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296 (1953). For unknown claimants, notification by publication will generally suffice. *See In re Argonaut Fin. Serv., Inc.*, 164 B.R. 107, 112 (N.D. Cal. 1994); *In re Thomas McKinnon Sec., Inc.*, 130 B.R. 717, 719-20 (Bankr. S.D.N.Y. 1991).

As characterized by the Supreme Court, a "known" creditor is one whose identity is either known or "reasonably ascertainable by the debtor." *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988). An unknown" creditor is one whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor]." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).[1]

A creditor's identity is "reasonably ascertainable" if that creditor can be identified through "reasonably diligent efforts." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n.4 (1983). Reasonable diligence does not require "impracticable and extended searches . . . in the name of due process." *Mullane*, 339 U.S. at 317. A debtor does not have a "duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it." *In re Charter Co.*, 125 B.R. 650, 654 (M.D. Fla. 1991).

Precedent demonstrates that what is required is not a vast, open-ended investigation. See *Mullane*, 339 U.S. at 317

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[1]Although *Mullane* involved the notice due beneficiaries on judicial settlement of accounts by the trustee of a common trust fund, subsequent courts have interpreted the case to set the standard for notice required under the Due Process Clause in Chapter 11 bar date cases. *See In re Pettibone Corp.*, 162 B.R. 791, 806 (Bankr. N.D. Ill 1994); *In re R.H. Macy & Co.*, 161 B.R 355. 359 (Bankr. S.D.N.Y. 1993).

("Nor do we consider it unreasonable for the State to dispense with more certain notice, to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee."); *See also Trump Taj Mahal Assocs. v. O'Hara (In re Trump Taj Mahal Assocs.)*, 1993 U.S. Dist. LEXIS 17827 at *9 (D.N.J. Dec. 13, 1993) (explaining that "those creditors who hold only conceivable, conjectural or speculative claims" are unknown). The requisite search instead focuses on the debtor's own books and records. Efforts beyond a careful examination of these documents are generally not required.[2] Only those claimants who are identifiable through a diligent search are "reasonably ascertainable" and hence "known" creditors.

In the instant case, the bankruptcy court failed to apply the "reasonably ascertainable" standard. It instead crafted a "reasonably foreseeable" test from dictum in *In re Brooks Fashion Stores., Inc.*, 124 B.R. 436 (Bankr. S.D.N.Y. 1991). In applying this test, the bankruptcy court found that "Chemetron knew or should have known that it was reasonably foreseeable that it could suffer claims from individuals living near the Bert Avenue Dump. . . ." It therefore found that claimants were known creditors.

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[2]Although some courts have held, regardless of the circumstances, that the "reasonably ascertainable" standard requires only an examination of the debtor's books and records, without an analysis of the specific facts of each case, *see e.g., In Re Best Products Co.*, 140 B.R 353. 358 (Bankr. S.D.N.Y. 1992); *In re Texaco, Inc.*, 182 B.R 937, 955 (Bankr. S.D.N.Y. 1995), we do not construe it so narrowly. Situations may arise when creditors are "reasonably ascertainable" although not identifiable through the debtor's books and records. *See. e.g., Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. at 491 (hospital's claim against deceased patient's estate possibly reasonably ascertainable). We need not address this possibility precisely, because, as we discuss, plaintiffs' claims in this case are so speculative that the identities of the plaintiffs could not be ascertained with "reasonably diligent efforts." *Mennonite*, 462 U.S. at 798, n.4.

We hold that in substituting a broad "reasonably foreseeable" test for the "reasonably ascertainable" standard, the bankruptcy court applied an incorrect rule of law. This constitutes clear error. The bankruptcy court's expansive test departed from the established rules of law and produced a result in conflict with other decisions. *See In re New York Trap Rock Corp.*, 153 B.R. 642, 646 (Bankr. S.D.N.Y. 1993) (holding government agency that failed to file claim for environmental cleanup to be an "unknown creditor" even where debtor had entered real estate contract with another agency of same governmental entity); *see also In re Trans World Airlines, Inc.*, 182 B.R. 102, 106 (D. Del. 1995) (holding claim unknown where plaintiffs had not filed suit until one year after bar claims date); *In re Texaco Inc.*, 182 B.R. 937, 954-55 (Bankr. S.D.N.Y. 1995) (holding claim unknown where owners of adjacent land filed environmental action after bar claims date); *In re Hunt*, 146 B.R. 178, 182 (Bankr. N.D. Tex. 1992) (holding claims unknown where plaintiffs filed state court suit and counterclaim after bar claims date). Even if we were writing on a blank slate, we would reject the bankruptcy court's expansive standard. Put simply, such a test would place an impossible burden on debtors.

A review of the facts in the case at bar reveals why the bankruptcy court's standard should not be followed. None of the claimants involved currently resides near either site. The claimants instead are scattered across Ohio and as far away as Texas. We are hard-pressed to conceive of any way the debtor could identify, locate, and provide actual notice to these claimants.

It has been suggested that Chemetron could have conducted a title search on all properties surrounding the sites to determine all persons who might have lived in the area during the twenty years between Chemetron's operation of the sites and the Chapter 11 proceeding. We decline to chart a jurisprudential course through a Scylla of causational difficulties and a Charybdis of practical concerns.

The causational difficulties are manifold and apparent. Under the bankruptcy court's rule, the debtor would have to

notify all reasonably foreseeable claimants, a determination that would rise and fall on potentially attenuated and certainly ambiguous causal nexi. At the most basic level, it remains unclear in the instant case what geographic area might be affected and hence how great an expanse the debtor's title search need cover. There is no indication whether a sufficient search would address properties one mile from the sites or one hundred miles away. The geographic area would presumably be affected by the potential for contaminant migration by air, water, or other carrier, further expanding the necessary notification area. Nor is the temporal dimension any more defined. With lingering contaminants and slow rates of decay, there would be no reason to limit future debtors to searching only for those exposed during their periods of ownership. And while we might be urged to bring these determinations under Mullane's "reasonably calculated under the circumstances" umbrella, 339 U.S. at 314, we hesitate to thrust the judiciary into a domain where decisions turn on rarely pellucid and often disputed scientific studies, requiring different varieties of technical expertise from case to case. In light of these problems of causation, the bankruptcy court's rule is unworkable.

We also anticipate grave practical difficulties with the bankruptcy court's broad notice requirement. Even if Chemetron had been required to search all potentially relevant title documents, its efforts would have come to no avail in this case. The vast majority of the claimants involved here were not property owners, but guests. No title search could reveal the identity of claimants who merely visited houses in the vicinity of the sites at some point in the distant past, and we decline to impose any Orwellian monitoring requirements on Chemetron and similarly situated corporations. Moreover, as demonstrated by the claimants here, debtors also face the problem of identifying all individuals whose parents might have lived in or visited houses in the vicinity of the site. And the problems of ascertaining, let alone notifying, all such persons implicate yet again all the difficulties of causation previously discussed.

Such an investigation, which would be required by the bankruptcy court's finding that claimants are known creditors, clearly contradicts both the caselaw cited above and common

sense. Creditors cannot be required to provide actual notice to anyone who potentially could have been affected by their actions; such a requirement would completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates. We reject the "reasonably foreseeable" test and follow the "reasonably ascertainable" standard.

In reaching this result, we are not unsympathetic to the alleged injury suffered by the claimants in this case. We stress that our holding addresses the burden placed on the bankruptcy debtor to provide actual notice to potential claimants, not the merits of a timely and properly filed tort suit. Where the debtor has sought the protection of bankruptcy law, however, procedural protections such as the bar claims date apply. These provisions cannot be circumvented by forcing debtors to anticipate speculative suits based on lengthy chains of causation. Accordingly, the bankruptcy court erred in finding that the claimants in this case were "known" creditors, and the district court's decision reversing the bankruptcy court on this finding will therefore be affirmed.

IV.

Having held that claimants were "unknown" creditors, we have little difficulty holding that the notice which Chemetron published in the *New York Times* and the *Wall Street Journal* was sufficient. It is well established that, in providing notice to unknown creditors, constructive notice of the bar claims date by publication satisfies the requirements of due process. *New York*, 344 U.S. at 296. Such notice must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. We find that Chemetron's notice met this standard.

Claimants argue that, given Chemetron's ongoing difficulties in cleaning up the Cleveland area sites as well as Chemetron's knowledge of the hazardous materials deposited there, Chemetron should have published notice in a Cleveland area paper. This argument fails.

"It is impracticable . . . to expect a debtor to publish notice in every newspaper a possible unknown creditor may read." *Best Products*, 140 B.R. at 358. Publication in national newspapers is regularly deemed sufficient notice to unknown creditors, especially where supplemented, as here, with notice in papers of general circulation in locations where the debtor is conducting business. *See, e.g., Brown v. Seaman Furniture Co.*, 171 B.R. 26 (E.D. Pa. 1994) (holding publication in local and national editions of the New York Times sufficient notice to claimant in Pennsylvania); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 112 B.R. 920 (N.D. Ill. 1990) (holding publication notice in the *Wall Street Journal* adequate under bankruptcy law); *Wright v. Placid Oil Co.*, 107 B.R. 104 (N.D. Tex. 1989) (holding publication in the *Wall Street Journal* sufficient notice to unknown creditor injured in Louisiana). Furthermore, claimants' argument is undermined by the fact that none of the claimants resided near the Cleveland sites at the time of the publication notice. Even publication in a Cleveland newspaper would not have reached the claimants currently residing in Texas or any other potential claimants who had moved away from Cleveland.

Because Chemetron's publication notice was reasonably designed to reach all interested parties, the district court's finding that the notice was sufficient to apprise unknown parties of the claims bar date is affirmed.

V.

Although we find little merit in claimants' notice arguments, we believe their claim of "excusable neglect" received inadequate consideration. Bankruptcy Rule 9006(b)(1) empowers a bankruptcy court to permit a creditor to file a late claim if the movant's failure to comply with an earlier deadline "was the result of excusable neglect." *See Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, _U.S. _, _, 113 S. Ct. 1489, 1491-92 (1993). In the instant case, because claimants are unknown creditors and Chemetron's publication notice was sufficient, claimants must show that their failure to file in a timely manner was due to "excusable neglect;"

otherwise, their claims arising pre-petition will be barred. *See Best Products*, 140 B.R. at 359.

The determination whether a party's neglect of a bar date is "excusable" is essentially an equitable one, in which courts are to take into account all relevant circumstances surrounding a party's failure to file. *See Pioneer*, 113 S. Ct. at 1498. The considerations to be weighed include:

> the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id.[3]

The bankruptcy court, in considering whether claimants should be permitted to file a late claim under the totality of the circumstances, wrote:

> This Court's understanding of *In re Remington Rand* is that acting promptly and diligently is but one factor when a court is considering the totality of the circumstances. The court finds the [claimants], while not acting very promptly or diligently, were not so sluggish as to

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[3]As the district court properly noted, it is unsettled whether "excusable neglect remains a viable defense for filing a late proof of claim when the claimant is entitled to only publication notice." Chemetron, 170 B.R. at 89 (citing *Trump Taj Mahal Assoc. V. O'Hara (In re Trump Taj Mahal Assocs.)*, 1993 U.S. Dist. LEXIS 17827 at *18 n.7 (D.N.J. Dec. 13, 1993)).

Under Bankruptcy Rule 9006(b), which allows the bankruptcy court to permit a late filing in cases of "excusable neglect," no differentiation is made between known or unknown creditors. Accordingly, claimants are not foreclosed from pursuing an "excusable neglect" defense in the instant matter.

> outweigh the fact that Chemetron did not provide reasonably calculated notice to alert [claimants] of the bankruptcy proceedings and the claims Bar Date. Therefore, the totality of the circumstances dictate that [claimants] are entitled to file a late claim.

Jones v. Chemetron Corp. (In re Allegheny Int'l, Inc.), Ch. 11 Case No. 88-00448 JLC, Adv. No. 92-2418, slip op. at 11 (Bankr. W.D. Pa. July 24, 1993). This analysis failed to adequately consider the totality of the circumstances presented. Not only was the bankruptcy court incorrect in its assumption that claimants were known creditors entitled to actual notice, but the court failed to make additional relevant factual findings, including the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant acted in good faith.

On appeal, the district court undertook its own review of the record to determine whether the totality of the circumstances supported claimants' filing of late claims. The district court wrote:

> We agree with the Bankruptcy Court that [claimants] did not act promptly or diligently. Their motion to file a late claim occurred more than four years after the bar date, two years after the Plan of Reorganization had been confirmed and twelve years after media and neighborhood attention first focused on the hazardous substances at the Bert Avenue Site. That [claimants] were allegedly unaware of their claims does not constitute excusable neglect. To permit [claimants] to file a late claim would prejudice Chemetron by denying a "fresh start" to which it is entitled. We conclude that the totality of the circumstances weighs heavily against late filing of [claimants'] claims.

Chemetron, 170 B.R. at 89-90 (citations omitted).

Although the totality of the circumstances analysis conducted by the district court was more appropriate than that conducted by the bankruptcy court, the district court's analysis also fell short of that required under *Pioneer*. The district court failed to undertake a comprehensive analysis of how the claimants' late filing would prejudice Chemetron, and also failed to consider the role that Chemetron might have played in contributing to the delay. Accordingly, we remand this issue to the bankruptcy court, with directions that the bankruptcy court undertake a more comprehensive and thorough determination of whether the totality of the circumstances support claimants' defense of "excusable neglect."

VI.

Finally, we disagree with the district court's treatment of the discharge issue. In the final paragraph of its memorandum and order, the district court concluded that the instant claims "were dischargeable and were discharged." *Chemetron,* 170 B.R. at 90. The bankruptcy court, however, had declined to reach the issue of discharge, deciding instead to dismiss claimants' adversary proceeding without prejudice. In fact, the district court itself noted that "[t]he Bankruptcy Court reserved ruling on the issue whether Appellants' claims are discharged in light of the permission to file the late claims." *Id.* at 86. We hold that the district court improperly reached the issue of discharge.

Chemetron contends that the issue of discharge was properly before the district court because Chemetron, in its notice of appeal to the district court, expressly appealed from the memorandum opinion and final order of the bankruptcy court in both the Chapter 11 proceeding and "the related Adversary Proceeding." This reference to the adversary proceeding, however, was not sufficient to create jurisdiction in the district court. Because the bankruptcy court reserved ruling on the issue of discharge, the bankruptcy court's dismissal without prejudice was not a final appealable order under 28 U.S.C. § 158(d) and therefore was not properly before the district court. Accordingly, we will vacate the district court's

ruling on discharge and remand this issue to the bankruptcy court.

VII.

For these reasons, we will affirm the district court's rulings that claimants were unknown creditors and that Chemetron's publication notice was sufficient. We will vacate and remand to the bankruptcy court the district court's judgment that claimants failed to demonstrate excusable neglect. We will also vacate and remand to the bankruptcy court the district court's ruling on discharge.

SAROKIN, *Circuit Judge*, concurring in the judgment.

I concur with the majority's judgment to affirm. I write separately, however, because I disagree with the majority's analysis regarding the definition of a "known" creditor entitled to actual notice under the law. The majority rejects the "reasonably foreseeable" test in favor of the "reasonably ascertainable" test. I believe that both are applicable.

I.

The "reasonably foreseeable" test determines which persons are entitled to receive notice. The "reasonably ascertainable" test determines the type of notice these persons are entitled to receive. All reasonably foreseeable claimants are entitled to receive some form of notice. Those who are reasonably ascertainable are *entitled to actual* notice. Those who are not are entitled to *constructive notice* - usually some form of publication reasonably calculated to reach them.

The bankruptcy court adopted the following standard to evaluate who qualifies as a known creditor in a bankruptcy proceeding:

> [I]f at the time of the filing it is reasonably foreseeable to a debtor, who is or should be aware of the potential consequences of its actions, that a party that is foreseeable will most likely file a claim against the

> debtor, that party is a "known" creditor of the debtor. Furthermore, the fact that a debtor does not know the name and address of a creditor does not prevent that creditor from being "known."

In re Allegheny International, Inc., No. 88-00448, typescript at 5-6 (Bankr. W.D. Pa. July 14, 1993). The court's standard would entitle a party whose claim was "reasonably foreseeable" to actual notice irrespective of whether or not that party's name and address was readily ascertainable. That result is not only illogical; it is contrary to Supreme Court jurisprudence. *Tulsa Professional Collection Serv., Inc. vs. Pope*, 485 U.S. 478, 490 (1988). I do not believe, however, that in restoring the "ascertainable" test to its proper place, as the majority does, we need go so far as to discard the "reasonably foreseeable" standard entirely. These tests are not mutually exclusive, or even at odds. They address separate issues. The "reasonably foreseeable" test has to do with whether the debtor knew or should have known that a claim would be brought; the "reasonably ascertainable" test has to do with the debtor's ability to learn the identity and location of the potential claimant or claimants.

The manufacturer of a product which it knows to be defective and who filed for bankruptcy should be under an obligation to give actual notice of the proceedings to known purchasers and users of its products, even if they have made no claim. They may not have done so because the injury had not yet manifested itself or they otherwise were unaware of the risks of such injury. Absent such requirement, if the harmful effects of the product did not manifest themselves for some period of time, consumers could be barred from relief for their injuries.

A rule whereby individuals whose claims are reasonably foreseeable are deemed "known" creditors if their identity and location is reasonably ascertainable would go a long way toward addressing these interests. Under such a rule, the following two steps would be required as a prerequisite to mandating actual notice to the tort claimants. First, the claims must be reasonably foreseeable. If they are reasonable and foreseeable, then actual notice must be given to those claimants who are

reasonably ascertainable. If there is a class or category of foreseeable claimants whose identity and/or location cannot be reasonably ascertained, then they are not "known creditors" entitled to actual notice (although they should receive substituted notice through reasonable means most likely to reach them). Such a result strikes the proper balance between the various purposes of bankruptcy law, which is concerned not merely with affording a fresh start to those who warrant it, but also with protecting the interests of creditors and claimants who may be adversely affected by the bankruptcy proceeding.

This result is clearly supported by the case law. The *Mullane* court was careful to limit its holding to the facts of that case, noting that "certain notice" was unnecessary for "beneficiaries whose interests are either conjectural or future . . . in view of the character of the proceedings and the nature of the interests here involved." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) (emphasis added). Furthermore, a claimant's interests are not "conjectural or future" simply because a lawsuit has not been filed yet. These interests exist from the time of the tortuous act, not just from the time the claimant seeks to vindicate them in court.[1]

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[1]The majority cites *Trump Taj Mahal Assocs. v. O'Hara (In re Trump Taj Mahal Assocs.)*, 1993 WL 534494 (D.N.J. Dec. 13, 1993), for the proposition that "those creditors who hold only conceivable, conjectural, or speculative claims" are unknown. *See* Majority Opinion, at 7. *Trump Taj Mahal* is a memorandum opinion by a district court, not reported in the relevant Reporter. As a district court opinion, it is not binding upon us. As an unreported memorandum opinion, it has no precedential value.

The Supreme Court, in *Tulsa Professional Collection Serv., Inc. v. Pope*. 485 U.S. 478 (1988) held that "it is reasonable to dispense with actual notice to those with mere conjectural claims." *Id.* at 490 (emphasis added). *The Random House College Dictionary* describes 'conjectural' as "of the nature of or involving conjecture; problematical." Insofar as "problematical" suggests tha the event is more likely than not not to occur, a claim that is "reasonably foreseeable" is not "problematical."

II.

Under this rule, I would find that it was not reasonably foreseeable that plaintiffs would file claims against Chemetron. As the district court noted in its opinion, throughout the early 1980s both the Nuclear Regulatory Commission and the Environmental Protection Agency time and again reassured both Chemetron and locale residents that the radiations from the Bert Avenue site presented no serious safety or health risk to the surrounding neighborhood. *Chemetron Corp. v. Jones, et al.*, No. 931582, typescript at 11 (W.D. Penn. June 11, 1994). Therefore, "[i]f Chemetron gave any thought to the subject, it was reasonable to assume that claims would not be filed because of the assurances of these agencies that the Bert Avenue Site posed no health risk to the neighborhood." *Id.* Therefore, "there was no reason for Chemetron to assume in 1988 that there would be claims from residents for ailments caused by exposure to the contamination from the Sites. At most, any future claim was speculative." *Id.* at 12. Under the facts of this case, I entirely agree with the district court's conclusion that "Appellees were not foreseeable claimants and, accordingly, were unknown creditors." *Id.* Since the claims were not foreseeable there is no reason to address whether the claimants were reasonably ascertainable.

III.

For the reasons stated above, I concur with the majority's judgment, though not with its reasoning in this one respect.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Reported at: In re: Allegheny Intl., Inc., 158 Bankr. 356 (Bnkr., W.D. Pa., 1993)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	
	)	
ALLEGHENY	)	
INTERNATIONAL,	)	Case No. 88-00448 JLC
INC., SUNBEAM	)	
CORPORATION,	)	
SUNBEAM HOLDINGS,	)	Adversary No. 92-2418
INC., ALMET/	)	Motion No. WM-02
LAWNLITE,	)	
INC. and	)	
CHEMETRON	)	Filed Under Local
CORPORATION,	)	Bankr. Rule 9013.4 ¶ 6(c)
	)	
Debtors.	)	
	)	Chapter 11
	)	
PHYLLIS JASKEY	)	
JONES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
CHEMETRON	)	
CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

The three matters before this court are: 1) a motion to allow a late claim filed by Phyllis Jaskey Jones, et. al. ("Plaintiffs"), against Allegheny International, Inc., et al., ("AI"); 2) an adversary complaint filed by the Plaintiffs requesting the court declare their claims against AI were not

discharged; and 3) a counterclaim filed by Chemetron Corporation ("Chemetron") against the Plaintiffs requesting, among other things, this court enjoin the Plaintiffs from pursuing their claims in state or federal court.

After careful consideration of the record, it is determined that the motion is granted and the adversary proceeding and counterclaim are dismissed without prejudice. In addition, the Plaintiffs are granted relief from the automatic stay sua sponte so that they can pursue to liquidation their action against Al pending in the Court of Common Pleas for Cuyahoga County, Ohio.

I. FACTS

From October 1965 through 1972, Chemetron manufactured an antimony oxide catalyst at their Harvard Avenue facility in Cuyahoga Heights, Ohio. This process involved the creation of toxic waste which was dumped at the McGean Chemical Company landfill located on Bert Avenue in Newburgh Heights, Ohio ("Bert Avenue Dump").

Plaintiffs were residents of, or visitors to, the residential neighborhood surrounding the Bert Avenue Dump. Plaintiffs allege that they have been physically injured from repeated exposure to toxic substances deposited by Chemetron at the Bert Avenue Dump. The Plaintiffs now seek compensation for their injuries from Chemetron.

AI and Chemetron filed a petition to reorganize under Chapter 11 of the Bankruptcy Code on February 20, 1988. The court ordered the claims Bar Date to be May 31, 1988. As required by that court order, Chemetron and Al provided notice of the May 31, 1988, Bar Date to all of their known creditors. Notice of the Bar Date was also published in the national editions of the *New York Times* and the *Wall Street Journal*. The Plaintiffs in this case were not listed as creditors on the Debtors' schedules and were not personally served with notice of the bankruptcy proceedings or of the claims Bar Date. On July 12, 1990 this court confirmed Al's proposed Plan of Reorganization.

In July of 1992, the Plaintiffs sued defendants McGean-Rohco, Inc., McGean Chemical Company, Inc., and Chemetron in the Court of Common Pleas for Cuyahoga County, Ohio in a case entitled Jaskey Jones, et al. v. McGean-Rohco, Inc., etc., et. al., Case No. 227973. The Plaintiffs have since filed two pleadings in this court: a motion to file a late claim and an adversary complaint requesting the court determine their claims were not discharged.

II. DISCUSSION

The Plaintiffs argue that they were known claimants at the time of the bankruptcy was filed and therefore, they should have received actual notice of the bankruptcy proceedings and the claims Bar Date. Because actual notice was not received, the Plaintiffs maintain that their claims were not discharged and they are entitled to file a late claim.

Chemetron asserts that the Plaintiffs were not known creditors and hence were not entitled to actual notice of the claims Bar Date or the bankruptcy proceedings. Moreover, Chemetron believes that the Plaintiffs are not entitled to file a late claim and that the Plaintiffs' claims against it have been discharged.

A. Motion to File Late Claims

1. "Known" vs. "Unknown" Claimants

The primary issue in this case is whether the Plaintiffs were known or unknown claimants. As a general rule, a known creditor's claim cannot be discharged in bankruptcy if that creditor did not receive actual notice of the relevant bankruptcy proceedings.[2]

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[2]In re Unioil, 948 F.2d 678 (10th Cir. 1991); In re Remington Rand Corp., 836 F.2d 825 (3rd Cir. 1988); Reliable Electric Co., Inc. v. Olson Construction Company, 726 F.2d 620 (10th Cir. 1984).

Because the words "known" and "unknown" tend to be labels of conclusion rather than analytical guidelines, it is important to precisely define what criteria are used to distinguish between "known" and "unknown" creditors. The criteria are particularly crucial in this case where Chemetron's actions may possibly create a tort claim against Al. Furthermore, when considering a standard or criteria for determining "known" and "unknown", the court must address the question of how probable must a potential suit against the debtor be before an "unknown" claimant manifests into either a "known" claimant or a known class of claimants. The Court of Appeals for the Third Circuit has not addressed this question, therefore the court must look to other districts and circuits for guidance.

This court adopts the view suggested by the Bankruptcy Court for the Southern District of New York in its treatment of In re Brooks Fashion Stores, Inc., 124 B.R. 436 (Bankr. S.D.N.Y. 1991). In that case, the debtors brought an adversary complaint against the Michigan Employment Security Commission (MESC) seeking declaratory and injunctive relief with respect to an unemployment tax delinquency claim asserted post-confirmation by the MESC. The court decided that MESC was not a known creditor of the debtor. However, the court noted that "[i]f there was a history of MESC redetermining Alberts' taxes, whereby Alberts should have reasonably foreseen[3] the assessment, the outcome here might very well be different." Id. at 444. [emphasis added].

This standard imposes on a company the responsibility of knowing whether it is reasonably foreseeable that a party may bring a lawsuit. Because the consequences of a company's actions may create or eliminate a lawsuit against the company, the court interprets In re Brooks to impose a reasonable affirmative duty on a debtor company to keep abreast of any obvious and potentially detrimental consequences its actions may

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[3]Foresight is defined as "heedful thought for the future; reasonable anticipation of result of certain acts or omissions." Blacks Law Dictionary 649 (6th ed. 1990).

have. This standard requires debtor companies to remain knowledgeable of the plain effects their hazardous activities might have on other parties and thus, discourages willful disregard of one's injurious acts in keeping with public policy.

Accordingly, this court adopts the following standard: if at the time of filing it is reasonably foreseeable to a debtor, who is or should be aware of the potential consequences of its actions, that a party that is foreseeable will most likely file a claim against the debtor, that party is a "known" creditor of the debtor. Furthermore, the fact that a debtor does not know the name and address of a creditor does not prevent that creditor from being "known."

In adopting this standard, reasonableness is the rule. This standard does not require a debtor company to spend a lot of time trying to predict the future rather than running a business. The burden imposed upon a debtor company is only to know the likely and obvious consequences of its actions.

2. Chemetron's "Foreseeability"

Reasonable foreseeability does not create a strict liability result. A negligible amount of pollution will not permit a late claim to be filed after the Bar Date. The question is not whether Chemetron polluted the site. Chemetron admits that it did. The question is whether Chemetron could have reasonably foreseen that it would incur legal liability because of its pollution. Considering the magnitude of the pollution and the specific and relevant circumstances of the case, it was reasonable to foresee this type of claim.

Chemetron knew or should have known that it was reasonably foreseeable that it could suffer claims from individuals living near the Bert Avenue Dump. As Chemetron itself stated:

> The early 1980's stand out as a point beyond which no reasonable person should have failed to suspect a potential connection [between the Bert Avenue Dump and local health problems] because of the blizzard of

> media and individual attention focused upon the alleged injuries supposedly caused by exposure to hazardous substances from the Bert Avenue site. In 1980, for example, the Nuclear Regulatory Commission (NRC) investigated the site and issued a public report stating that radioactive contamination at the site was great enough to warrant a remediation effort. [emphasis supplied]

Chemetron's Preliminary Statement at 8.

In addition, there is sworn evidence that the dump site was unfenced for a pertinent period of time. Further, that site actually contained swings on which the local children played and was used as a park. (Looby Depo. of November 6, 1991 at 15)

This court holds that at the time AI filed for Chapter 11 protection in 1988, it was reasonably foreseeable that Chemetron would suffer claims from the residents surrounding the Bert Avenue Dump. Consequently, this court concludes that the Plaintiffs were known creditors.

3. Actual Notice

The form of actual notice required under Due Process is dependent on the facts of each case.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [emphasis added]

Mullane v. Central Hanover Trust Company, 339 U.S. 306, 314 (1950).

Notice by publication in the national editions of the *New York Times* and the *Wall Street Journal*, was not "reasonably

calculated" to give notice to these Plaintiffs. The fact that such national newspaper notice was the only notice required by a court order is not material. The court was not apprised of Chemetron's fact situation when the court issued its order. It is the debtor's duty to propose the actual notice. Further, notice by publication was intended to alert "unknown" claimants, not "known" claimants such as the Plaintiffs.

In the interest of clarifying what is expected of debtors, the court suggests as an example that one form of notice that would have been reasonably calculated under these circumstances would have been for Chemetron to place advertisements in a local newspaper that circulates among the potential claimants. Chemetron could have also engaged in a mailing to the houses surrounding the Bert Avenue Dump or post notices in the neighborhood surrounding the dump. This list is intended to be suggestive, not exhaustive.

The court does not demand useless Herculean efforts on the part of debtors to notify a reasonably foreseeable claimant known only by the site of an event and not by name. However, Chemetron knew the specific location of the toxic event and because of the possible mechanism of injury, it was reasonable to expect the Plaintiffs to be located in the neighborhood surrounding the Bert Avenue Dump. Chemetron should have used that knowledge to formulate a strategy to create a notice reasonably calculated to apprise those potential claimants of the bankruptcy proceedings.[4]

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[4]The court cautions against extending its holding which defines when local notice is required.

"In the Mullane case... the Court thoroughly canvassed the problem of sufficiency of notice under the Due Process Clause, pointing out the reasons behind the basic constitutional rule, as well as the practical consideration which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation." Schroeder v. City of New York, 371 U.S. 215, 279 (1962) (summarizing Mullane v. Central Hanover Trust Company, 339 U.S. 306 (1950)).

Chemetron contends that because the last of the Plaintiffs to reside near the Bert Avenue Dump left the area in 1985, local notification as the court suggests would not have been effective. Although this is also true, this argument is unpersuasive. Actual notice is designed to in good faith satisfy Due Process considerations even though the notice may not be successful and reach the intended recipient in some instances.

> The Supreme Court has thus established a balancing procedure in which costs and efficiency considerations are balanced against the probability that a procedure will effectuate notice.
>
> What is needed in bankruptcy proceedings is a form of notice which is likely to achieve actual notice in a large volume of cases but is not overly expensive or time consuming.

Matter of Park Nursing Center, Inc., 766 F.2d 261, 263 (6th Cir. 1985) (discussing Mullane v. Central Hanover Trust Company, 339 U.S. 306 (1950)).

Actual notice is not presumed to be impossible when a debtor does not know a creditor's name and address. Of course, having a name and address makes actual notice easier, however, the test is whether the debtor's attempted notice was reasonably calculated to provide notice, not whether the notice was actually received.

Locale specific notice need not be flawless. Locale specific notice is one method that is reasonably calculated to reach reasonably foreseeable claimants in similar fact situations without imposing an undue expense or burden on the debtor. The possibility is not foreclosed that there are other methods of notice that would satisfy the Mullane due process requirements for this fact situation.

The case at bar, while not unique, is somewhat atypical in its facts and as a result, this court's holding is fact specific.

In light of the above, Chemetron's contention that locale specific notice would not have been effective because all of the Plaintiffs had moved away from the Bert Avenue area is not controlling. The important conclusion is that Chemetron did not undertake any notice that was reasonably calculated to notify these unique Plaintiffs of the bankruptcy proceedings and the claims Bar Date, even though their potential injuries were foreseeable.

4. May the Plaintiffs File a Late Claim

Having determined already that the Plaintiffs were known creditors and that Chemetron did not to give the Plaintiffs actual notice, the issue of whether the Plaintiffs are entitled to file a late proof of claim. The court in In re Remington Rand Corporation, 836 F.2d 825 (3rd. Cir. 1988) considered the totality of the circumstances when it had to decide whether a creditor had acted promptly and diligently in filing a late proof of claim.

> Remington acknowledges that it failed to provide the government, a known creditor, with proper [actual] notice of the Bar Date for claims under the plan. Accordingly, the government was entitled to request permission to file a late proof of claim [citations omitted]. Upon receipt of such a request, however, the bankruptcy court must examine the totality of the circumstances before allowing a late filing.

In re Remington Rand Corporation, 836 F.2d at 833.

The issue presented now is whether the totality of the circumstances favors allowing the Plaintiffs to file a late proof of claim. This court's understanding of In re Remington Rand is that acting promptly and diligently is but one factor when a court is considering the totality of the circumstances. The court finds that the Plaintiffs, while not acting very promptly or diligently, were not so sluggish as to outweigh the fact that Chemetron did not provide reasonably calculated notice to alert the Plaintiffs of the bankruptcy proceedings and the claims Bar

Date. Therefore, the totality of the circumstances dictate that the Plaintiffs are entitled to file a late claim.

B. Adversary Complaint and Counterclaim

The amount of the Plaintiffs' claims, if any, against Chemetron has not been determined. Consequently, the court will not address the issue of whether the claim is or is not discharged because the court has permitted a late claim to be filed. Therefore, the Plaintiffs' adversary complaint and Chemetron's counterclaim are dismissed without prejudice.

III. CONCLUSION

The Plaintiffs' motion to file a late claim is granted. This court expresses no opinion or judgment on the validity of Plaintiffs' claim that the Bert Avenue Dump caused or aggravated Plaintiffs' alleged injuries. In addition, the Plaintiffs' adversary complaint to declare that Plaintiffs' claims are not discharged and Chemetron's counterclaim are dismissed without prejudice.

Finally, the court grants the Plaintiffs relief from the automatic stay sua sponte. 11 U.S.C. § 362. The Plaintiffs may pursue their Cuyahoga County, Ohio action entitled Jaskey Jones, et al. v. McGean-Rohco, Inc., et al., Case No. 227973 to liquidation, but not collection, against the Chemetron.

An appropriate Order is attached.

Dated this day _____ of July, 1993,
at Pittsburgh, Pennsylvania.

Joseph L. Cosetti
U.S. Bankruptcy Judge

cc: William Mitchell, Esq.
Attorney for Plaintiffs
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Reported at: In re: Allegheny Intl, Inc., 170 Bankr. 83 (W.D. Pa., 1994)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In re:	)	
	)	
ALLEGHENY	)	
INTERNATIONAL,	)	Bankruptcy No. 88-448
INC., SUNBEAM	)	Chapter 11
CORPORATION,	)	
SUNBEAM HOLDINGS,	)	
INC., ALMET/	)	
LAWNLITE,	)	
INC., AND	)	
CHEMETRON	)	Civil Action No. 93-1582
CORPORATION,	)	
	)	
Debtors.	)	
	)	
	)	
CHEMETRON	)	
CORPORATION,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
PHYLLIS JASKEY	)	
JONES, et al.,	)	
	)	
Appellees.	)	

MEMORANDUM AND ORDER

BARRON P. McCUNE, Senior District Judge
June 14, 1994.

We consider the appeal of appellant Chemetron Corporation of the Bankruptcy Court's Memorandum Opinion

and Final Order ("Order") entered August 2, 1993 in the underlying Chapter 11 reorganization proceeding and Adversary Proceeding No. 92-2418. By the Order appellee Phyllis Jaskey Jones and eighteen other appellees were permitted to file late claims against Chemetron. Appellees' late claims arise from their allegations against Chemetron and two other defendants (not parties to this appeal) for personal injuries allegedly caused by exposure to radioactive and toxic contamination at two industrial sites, one in Newburgh Heights and one in Cuyahoga Heights, Ohio.

This appeal is pursuant to Bankruptcy Rule 8001 (a) Our jurisdiction is pursuant to 28
U.S.C. § 158(a).

BACKGROUND

PROCEDURAL HISTORY

Allegheny International, Chemetron and other debtors (collectively "Debtors") filed a petition to reorganize under Chapter 11 of the Bankruptcy Code on February 20, 1988. The Bankruptcy Court ordered the claims bar date to be May 31, 1988. As required by that order, notice of the bar date was provided to creditors listed on Debtors' schedules of liabilities and certain holders of securities. Debtors were ordered to publish the same notice in the national editions of the New York Times and Wall Street Journal.[1] Appellees were not listed on the Debtors' schedules and were not personally served with notice

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[1]The Debtors voluntarily published notice in seven other newspapers in areas the Debtors had ongoing business at the time of filing. According to Chemetron, notice was not published in any Cleveland area newspaper because Chemetron sold the manufacturing facility at Harvard Avenue and the Bert Avenue Site in 1975 and was not engaged in manufacturing activities in that area at the time it filed for Chapter 11 protection.

of the bar date or the bankruptcy proceedings. On July 12, 1990, the Bankruptcy Court confirmed the Debtors' proposed Plan of Reorganization.

On March 2, 1992, Appellees sued Chemetron and two other companies, McGean-Rohco, Inc. and McGean Chemical Company, Inc., in the Court of Common Pleas in Cleveland, Ohio for injuries they allegedly sustained as the result of exposure to hazardous and radioactive material deposited at the Bert Avenue Site in Newburgh Heights, Ohio by Chemetron. In response to the complaint, Chemetron moved to dismiss the claims as to Chemetron in light of the confirmation of the Plan of Reorganization. Appellees then filed a motion with the Bankruptcy Court seeking permission to file late claims and a separate motion to declare that their claims were not discharged. Chemetron answered the adversary proceeding and counterclaimed, seeking a declaratory judgment against Appellees that their claims against Chemetron were discharged as a result of the reorganization.

On August 2, 1993, the Bankruptcy Court granted Appellees' motion for permission to file late claims against Chemetron and sua sponte permitted appellees to proceed with their litigation against Chemetron in the Ohio lawsuit. The adversary proceeding and Chemetron's counterclaim were dismissed without prejudice. The Bankruptcy Court reserved ruling on the issue whether Appellees' claims are discharged in light of the permission to file the late claims. This appeal followed.

The Bankruptcy Court held that Appellees were known creditors of Chemetron in February, 1988 when Chemetron filed for Chapter 11 reorganization. As known creditors, the Bankruptcy Court held that Chemetron was required to serve on them actual notice of the bar date, not notice by publication. Lastly, the Bankruptcy Court concluded that the totality of the circumstances weighed in favor of allowing Appellees to file late claims.

FACTUAL BACKGROUND

Appellees' Amended Complaint states that in 1965 McGean Chemical Company sold to Chemetron its stock in a manufacturing facility on Harvard Avenue located in Cuyahoga Heights, Ohio, and the Bert Avenue Site, located approximately 1/2 mile from the manufacturing facility. Chemetron owned and operated the Harvard Avenue plant and the Bert Avenue Site from 1965 until 1975 when Chemetron sold both sites to McGean. Subsequently, McGean merged with Rohco, Inc. to become McGean-Rohco, the current owner of the sites at issue. During its period of ownership, Chemetron manufactured an antimony oxide catalyst at the Harvard Avenue facility. The process required the use of depleted uranium. In 1974 Chemetron dismantled its catalyst production equipment. In 1975 Chemetron disposed of radioactive material from the Harvard Avenue facility at its Bert Avenue Site. In 1980 the Nuclear Regulatory Commission informed Chemetron that decontamination of the Bert Avenue Site was required.

Appellees are former residents of Newburgh Heights and Cuyahoga Heights who allegedly visited or lived in the vicinity of the Bert Avenue Site from as early as the 1930s to 1985.[2] Appellees allege that the operation and use of the Harvard Avenue plant and Bert Avenue Site by Chemetron, McGean Chemical Company and McGean Rohco caused Appellees to be exposed to radioactive and hazardous substances. The exposure allegedly caused a variety of medical problems and increased their risk of future medical problems and cancer. Appellees contend that they first became aware that the alleged exposure to

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[2]Appellees allegedly frequently visited or lived in two homes located in Newburgh Heights. According to the Amended Complaint, the residence located at 3969 E. 29th Street was sold in 1981 with one Appellee continuing to reside in the house as a tenant until 1985. Appellees associated with that home allegedly visited either weekly or several times a week until 1985. The other house, located at 1989 East 29th Street, was sold in 1965.

the substances caused their medical problems in either October 1991 or March 1992.

The parties have filed briefs. We heard oral argument on February 25, 1994.

DISCUSSION

We review the Bankruptcy Court's findings of fact under the clearly erroneous standard. Fed. R. Bankr. P. 8013. Conclusions of law are subject to de novo, review. Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3rd Cir 1991), cert. denied, _ U.S. _, 117 L. Ed 2d 620, 112 S. Ct. 1476 (1992). However, where there are mixed questions of law and fact, we undertake "'[de novo] review of the trial court's choice and interpretation of legal precepts and its application of those precepts to historical facts.'" Id. quoting Universal Minerals, Inc. vs. C. A. Hughes & Co. , 669 F. 2d 98, 101-02 (3d Cir. 1981); see also, Kilbarr Corp. v. General Services Administration, (In re Remington Rand Corp.), 836 F.2d 825, 828 (3d Cir. 1988). Since the issues here are mixed questions of law and fact, we shall review this appeal de novo.

Under Bankruptcy Rule 3003(c)(3) the Bankruptcy Court is required to set a bar date for filing proofs of claim. The bar date is strictly construed to further the objective of finality in bankruptcy proceedings. Charter Crude Oil Co. v. Petroleos Mexicanos (In re Charter Co.), 125 B.R. 650, 654 (M.D. Fla. 1991). Confirmation of the debtor's Plan of Reorganization discharges the debtor from claims which arose prior to the confirmation date. Id.; 11 U.S.C. § 1141.

Due process requires that actual written notice of a debtor's bankruptcy filing and bar date be provided to known creditors. New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 296 (1953). Where the names, addresses and interests of potential parties are unknown, notification by publication satisfies the requirements of due process. Id. A "known" creditor is one whose identification as such is either known or 'reasonably ascertainable by the debtor." Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478,

490 (1988). An "unknown" creditor is one whose identification is not "reasonably ascertainable" and whose claim is merely "conceivable, conjectural or speculative." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950). The principal argument raised by Chemetron in this appeal is that the standard applied by the Bankruptcy Court that Appellees' claims were reasonably foreseeable making Appellees known creditors conflicts with governing bankruptcy law.

The standard adopted by the Bankruptcy Court was: "if at the time of filing it is reasonably foreseeable to a debtor who is or should be aware of the potential consequences of its actions, that a party that is foreseeable will most likely file a claim against the debtor, that party is a known, creditor of the debtor." Order at 5-6. The Bankruptcy Court also held that a creditor can be 'known' even though the debtor does not know the creditor's name and address. Id. at 6. The Bankruptcy Court stated that the aforementioned standard was suggested by the Bankruptcy Court for the Southern District of New York in In re Brooks Fashion Stores, Inc., 124 B.R. 436 (Bankr. S.D.N.Y. 1991).

In Brooks, the debtor had no knowledge of the claim of the Michigan Employment Security Commission ("MESC"). Notice of the bar date for filing proofs of claim was published in two national newspapers and a trade paper. A proposed plan of reorganization was confirmed with an order containing a permanent injunction against claims which arose prior to the order's entry. MESC argued unsuccessfully that it was not barred by the order confirming the plan because it did not receive written notice of the filing of the petition. The court stated that "[w]here a debtor has no knowledge of a claim and in good faith files its petition with as thorough a schedule as possible, the debtor has done all that is required under the Code." Id. at 444. The court noted that had there been a "history of MESC redetermining [the debtor's] taxes, whereby [the debtor] should have reasonably foreseen the assessment, the outcome here might very well be different." Id. at 444. It is from this language that the Bankruptcy Court derived a "reasonable affirmative duty on a debtor company to keep

abreast of any obvious and potentially detrimental consequences its actions may have." Order at 5.

We respectfully disagree with the Bankruptcy Court's interpretation of Brooks. The dicta in Brooks indicated that had MESC redetermined the debtor's taxes in prior years, it would be reasonable for the debtor to foresee that MESC might again exercise its right. Here, the Bankruptcy Court eliminated the past dealings of a creditor with a debtor from its reasonably foreseeable test. The decisions cited by the court in Brooks also demonstrate that past dealings between the creditor and debtor are essential in determining whether a creditor should have been "known". See In re Flanigan's Enterprises, Inc., 77 B.R. 963 (Bankr. S.D. Fla. 1987) (Creditor did not knowingly fail to list insurer as creditor where insurance creditor waited almost three years to notify the debtor of amounts due under a terminated insurance contract.); Charter Crude Oil Co. v. Petroleos Mexicanos (In re Charter Co.), 125 B.R. 650, 654 (M.D. Fla. 1991) (Three years prior to filing for bankruptcy debtor allegedly breached its contract with creditor by emitting a reduced payment to creditor. That debtor knew there was possibility of a claim by creditor did not make the creditor "known.")

Elsewhere in the Brooks opinion the court reemphasized the importance of an historical relationship between the debtor and creditor as a condition precedent for a creditor to be one of debtor's "known" creditors. In addressing MESC's argument that the discharge provision of the Code, 11 U.S.C. § 1141, is unconstitutional, the court concluded that § 1141(d)(1)(A) is not unconstitutional per se, but that its application in certain circumstances could be unconstitutional. The facts in the cases cited indicated "that the alleged creditor was 'known' or clearly should have been known under the circumstances." Id. In all of the cases cited, there were past dealings between the creditors and debtors. Moreover, the circumstances in the cases cited by

the court strongly suggest that a search of the debtors' records would have revealed the creditors' potential claims.[3]

To comply with the requirements of due process, a debtor is not obligated to conduct an "impracticable and extended" search for all potential creditors. Mullane, 339 U.S. at 317-18. The debtor does not have a "duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it." Charter Crude Oil Co., supra, 125 B.R. at 655. Nor is the debtor "required to give actual notice of the bar date to a creditor when the debtor could reasonably have believed that the creditor had abandoned its claims against debtor." Id. Even where a debtor knows there is a possibility of a claim by a creditor, if the creditor's claim is merely conceivable, conjectural or speculative, the debtor is not required to give actual notice to the debtor. Id. at 656. However, if a debtor knows or should know of its potential liability to a specific creditor, that creditor is a known creditor entitled to actual notice." In re Thomson McKinnon Sec., Inc., 130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991).

The Bankruptcy Court found that Appellees were known creditors in February 1988 because their claims were foreseeable at the time Chemetron filed for bankruptcy. However, as stated above, absent some course of dealing or some communication

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[3]The cases cited in Brook regarding the constitutionality of § 1141 shared in common specific prepetition relationships between the debtor and creditor which strongly suggested that the debtor had knowledge of "he creditor's potential claim against the debtor prior to filing the petition. See, Broomall Industries, Inc. v. Data Design Logic Systems, Inc., 786 F.2d 401 (Fed. Cir. 1986) (Fact issue whether debtor on notice of creditor's patent infringement claim); Reliable Electric Co. v. Olson Constr. Co., 726 F.2d 620 (10th Cir. 1984) (Debtor allegedly breached subcontract pre-petition); In re Intaco Puerto Rico, Inc., 494 F. 2d 94 (1st Cir. 1974) (Pre-petition contractual relationship).

between a debtor and potential claimant indicating the viability of a claim, a creditor is not reasonably foreseeable. Appellees did not produce any evidence which suggests a course of dealing between Chemetron and Appellees or a similarly situated resident during the relevant time period. There is nothing in the record which contradicts the claim that Chemetron and Allegheny International were unaware of Appellees' claims until Appellees filed their Ohio lawsuit, more than 4 years after Chemetron filed for reorganization. It is uncontroverted that between 1980, when the NRC first informed Chemetron of unpermitted disposition of radioactive materials at the Bert Avenue Site and February 1988, no one filed a claim or expressed an intention to file a claim against Chemetron.

Even if we were to apply the foreseeability test proposed by the Bankruptcy Court, the record does not support the claim that Appellees were foreseeable claimants in 1988. In 1980 the news of the contamination at the Bert Avenue Site was publicized in the local newspapers and on television. At meetings concerned residents were told by NRC experts that the radiation was serious enough to require cleaning up eventually, but did not pose a safety or health risk. In 1981 the EPA reported that no ground water contamination had been found at the Site. In 1983 the EPA reiterated that the Bert Avenue Site presented no serious radiation hazard to the surrounding neighborhood. If Chemetron gave any thought to the subject, it was reasonable to assume that claims would not be filed because of the assurances of these agencies that the Bert Avenue Site posed no health risk to the neighborhood. There is no evidence that Chemetron was aware of any danger the Site presented to residents. In fact the danger did not exist according to the agencies involved. Nor is there anything in the record to support Appellees' contention that Chemetron knew that children played at the Site prior to 1980 when the Bert Avenue Site was fenced and posted with warning signs. In 1975, the Site, belonged to McGean-Rohco. Thus, there was no reason for Chemetron to assume in 1988 that there would be claims from residents for ailments caused by exposure to the contamination from the Sites. At most, any future claim was speculative. We find that Appellees were not foreseeable claimants and, accordingly, were unknown creditors.

The Bankruptcy Court found Appellees were entitled to actual notice because, by application of its reasonable foreseeability test, they were "known" creditors. Known creditors are required to be given actual notice of the claims bar date. New York, N.H. & H.R. Co., supra, 344 U.S. 293. However, for unknown creditors such as Appellees whose claims are speculative and not foreseeable, it is well established that constructive notice of the bar date by publication satisfies due process. Id., at 296; In re Thomson McKinnon Securities Inc., 130 B.R. at 720; Charter International Oil Co. v. Ziegler (In re Charter), 113 B.R. 725, 727-28 (M.D. Fla. 1990). Here, publication of notice in the national editions of the Wall Street Journal and New York Times as well as in local newspapers where Debtors had ongoing business at the time of filing was sufficient under the circumstances to apprise unknown parties of the pendency of this action. New York, N.H. & H.R. Co., 344 U.S. at 296; In re Brooks Fashion Stores Inc., 124 B. R. at 445.

Except upon a showing of excusable neglect, a bankruptcy court may not accept a late filing of a creditor's claim. In re Waterman Steamship Corp., 59 B.R. 724, 727 (Bankr. S.D.N.Y. 1986). Although it is questionable whether excusable neglect remains a viable defense for filing a late proof of claim when the claimant is entitled to only publication notice, we shall err on the side of caution and apply the standard.[4] The determination of whether neglect is excusable

> "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its impact on the judicial proceedings, the reason for the delay, including

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[4]See Trump Taj Mahal Associates v. O'Hara (In re Trump Taj Mahal Associates), No. 93-3571, 1993 U. S. Dist. LEXIS 17827 at *18 n. 7. (D.N.J. December 13, 1993); In re Best Products Co., Inc., 140 B.R. 353, 359 (Bankr. S. D. N. Y. 1992); In re Waterman Steamship, 59 B.R. at 728.

whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

Pioneer Investment Serv. Co. v. Brunswick Assocs. Ltd. Partnership, _ U.S._, 123 L.Ed. 2d 74, 113 S. Ct. 1489, 1498 (1993).

In the case at bar the Bankruptcy Court found that although Appellees, "while not acting very promptly or diligently, were not so sluggish as to outweigh the fact that Chemetron did not provide notice to alert the [Appellees] of the bankruptcy proceedings and the claims Bar Date. " Order at 11. We disagree and find that the notice was adequate under the circumstances. We agree with the Bankruptcy Court that Appellees did not act promptly or diligently. Their motion to file a late claim occurred more than four years after the bar date, two years after the Plan of Reorganization had been confirmed and twelve years after media and neighborhood attention first focused on the hazardous substances at the Bert Avenue Site. That Appellees were allegedly unaware of their claims does not constitute excusable neglect. In re Best Products Co., Inc., 140 B.R. 353, 359 (Bankr. S.D.N.Y. 1992); In re Penn Central Transportation Co., 42 B.R. 657, 675 (E.D. Pa. 1984), aff'd, 771 F. 2d 762 (3d Cir. 1985). To permit Appellees to file a late claim would prejudice Chemetron by denying a "fresh start" to which it is entitled. In re Trump Taj Mahal Associates, 156 B.R. 928 (Bankr. D. N.J. 1993), aff'd, sub nom., Trump Taj Mahal Associates v. O'Hara (In re Trump Taj Mahal Associates), No. 93-3571, 1993 U. S. Dist. LEXIS 17827 (D. N. J. December 13, 1993). We conclude that the totality of the circumstances weighs heavily against late filing of Appellees' claims.

Based on the foregoing, the record and the relevant law, we conclude that notice by publication was sufficient, that the claims were dischargeable and were discharged, and that the Appellees have failed to demonstrate excusable neglect. Accordingly, the Bankruptcy Court's Order entered August 2, 1993 will be reversed.

An order follows.

BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In re:	)	
	)	
ALLEGHENY	)	
INTERNATIONAL,	)	Bankruptcy No. 88-448
INC., SUNBEAM	)	Chapter 11
CORPORATION,	)	
SUNBEAM HOLDINGS,	)	
INC., ALMET/	)	
LAWNLITE,	)	
INC., AND	)	
CHEMETRON	)	Civil Action No. 93-1582
CORPORATION,	)	
	)	
Debtors.	)	
	)	
	)	
CHEMETRON	)	
CORPORATION,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
PHYLLIS JASKEY	)	
JONES, et al.,	)	
	)	
Appellees.	)	

ORDER

AND NOW, June 14, 1994, the Order of the Bankruptcy Court entered August 2, 1993 in the underlying Chapter 11 reorganization proceeding and Adversary Proceeding No. 92-2418 is hereby reversed. The Motion to File Late Claims against Chemetron is denied. Appellees Phyllis Jaskey Jones, et al., are hereby enjoined from pursuing their action against Chemetron in the Court of Common Pleas of Cuyahoga County, Ohio, Jones v. McGean-Rohco, Inc., Case No. 227973, pursuant to 11 U. S. C. § 362.

BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit were mailed this _____ day of _____, 1996 to the following parties and U.S. Trustee to this proceeding:

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In addition, the following attorneys from the original bankruptcy proceeding were served with a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit this _____ day of _____, 1996:

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Chemetron Corporation
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